European University Institute
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Fluid Dynamics: Emergency Liquidity Assistance during the Eurocrisis

Nicholas Anthony Lee

Thesis submitted for assessment with a view to obtaining the degree of Master in Comparative, European and International Laws (LL.M.) of the European University Institute

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Supervisor

Professor Claire Kilpatrick, European University Institute

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Department of Law – LL.M. Programme

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Fluid dynamics: Emergency Liquidity Assistance during the Eurocrisis

1. Introduction

A. General

The contours of the post-crisis ECB are still being mapped.[1] One of the ECB's most influential crisis management tools, its oversight of Emergency Liquidity Assistance (ELA), remains particularly unexplored, however. This paper consequently has two main aims. First, to identify and describe the legal framework enabling ECB oversight of ELA. Second, to evaluate the ECB's interventions in ELA during the Eurocrisis in light of that framework.

Both aims, if fulfilled, are contributions to the literature. As regards the first, whereas Steinbach provides a lucid examination and description of the general legal framework for ELA provision in the Euro Area, his analysis does not focus, in a granular manner, on how the ECB's oversight of ELA is actually enabled.[2] A concentrated analysis of the specific Treaty provisions involved and their inter-relationship remains outstanding. As regards the second, whereas Beukers considers ELA oversight along the faultline of central bank independence/intervention, Kilpatrick discusses ELA as an abnormal source of law and Viterbo reviews how the ECB has made ELA provision conditional on the adoption of certain policies,[3] these thematic commentaries do not provide a comparative study of the ECB's actual interventions in ELA during the Eurocrisis. This paper seeks to fill both gaps by proposing a multi-layered legal justification for the ECB intervention in ELA and then showing how this framework is a necessary, but not sufficient, ingredient for evaluating the ECB's actual interventions.

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1 For an overview of the crisis management tools of the ECB, see Claire Kilpatrick, 'Abnormal Sources and Institutional Actions in the EU Sovereign Debt Crisis: ECB Crisis Management and the Sovereign Debt Loans' (Forthcoming); for a consideration along an axis of independence and intervention, see Thomas Beukers, 'The New ECB and its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention', *Common Market Law Review*, 50(6) (2013), 1579-1620; for a perspective on the subordination of monetary stability to financial stability, see Stefania Baroncelli, 'The Independence of the ECB after the Economic Crisis', in *The Constitutionalisation of European Budgetary Constraints*, ed. Maurice Adams et al (Hart Publishing, 2014); for discussion of the ECB's interventions in financial markets, see Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (CUP, 2014), pp.162-8.

2 Armin Steinbach, 'The Lender of Last Resort in the Eurozone', *Common Market Law Review*, 53(2) (2016), 361-83.

3 Beukers (n.1); Kilpatrick (n.1); Annamaria Viterbo, 'Legal and Accountability Issues Arising from the ECB's Conditionality', *European Papers*, 1(2) (2016).

The paper therefore seeks to take the ECB seriously as an institution staffed by publicly-minded individuals who, it is assumed, prefer and seek to act in a lawful manner. It emphasises, however, that the ECB's doctrine of ELA oversight has emerged through iterative engagement with a messy, unpredictable and contested reality and under the immense pressures of the Eurocrisis, rather than through careful ex ante planning.[4] The paper concludes that ECB intervention in ELA is legally justified, but its actual interventions are more problematic.

B. Why focus on ELA?

ELA has emerged as a crucial and controversial tool of crisis management. In Ireland (2010), Cyprus (2013) and Greece (2015), the ECB used its oversight of ELA to increase the pressure on a Member State to accept a bail-out (interchangeably: Economic Adjustment Programme [EAP]). In Ireland and Cyprus, the ECB warned that ELA would be withdrawn unless the government enter an EAP and, with their national banking systems reliant on ELA, both governments quickly did so. In Greece, the ECB capped ELA pending a conclusion to negotiations between Greece and its creditors. The ELA ceiling triggered the imposition of strict capital controls by the Greek government, before its eventual acceptance of a bail-out, despite the electorate having rejected one only days beforehand. Section 4 discusses each country in more detail.

Although the exact mechanism through which bail-outs have been provided has changed through the Eurocrisis,[5] they all involve a partnership between the Commission, the ECB and the International Monetary Fund (IMF), collectively, until 2015: the 'Troika', and have all been conditional on the recipient Member State's commitment to economic reforms premised on rapid

4 The label 'doctrine' recognises that the ECB's oversight of ELA is not governed by a determinative set of detailed instructions in the Treaties. Instead, it requires the ECB to select and prioritise certain provisions and apply them to a complex reality, often in pursuit of a particular goal. The combination of legal argument and logical reasoning, as expressed by the ECB in various letters, publications and statements, which holds this process together is the doctrine.

5 For an overview of the European Financial Stability Mechanism (EFSM) and the European Financial Stability Facility of 2010, see Tuori and Tuori (n.1). See also for their overhaul by the European Stability Mechanism (ESM) in 2012, which is now the Euro Area's permanent rescue mechanism. On the interaction between the EFSM and the ESM during the Greek crisis of 2015, see Kilpatrick (n.1).

fiscal consolidation. The EAPs therefore have significant redistributive effects within domestic polities. The ECB's interventions regarding ELA are problematic because a non-majoritarian, supranational institution with a limited mandate has exerted influence across policy fields traditionally reserved to democratic contest.

This paper assesses the legality of those interventions. Section 2 takes a step back by introducing the concept of the Lender of Last Resort (LOLR) and locating ELA under this umbrella. It describes why ELA is such a powerful lever. Section 3 focuses on the legal framework for ELA in the Euro Area and identifies which provisions justify the ECB's interventions. Section 4 concludes by assessing four examples of ELA provision during the Eurocrisis in light of the hypothetical legal justification developed in the previous Sections.

2. LOLR and ELA

A. Why is the LOLR needed?

In most economies, the central bank acts as LOLR to the banking sector.[6] Since central banks enjoy a monopoly on the issue of currency, they can provide additional funding to the banking sector during liquidity squeezes, which occur when an otherwise solvent bank does not have enough liquid assets (i.e. cash) to meet its short-term obligations. For example, if customers seek to withdraw their deposits simultaneously (a classic 'bank run'), a bank may struggle to repay all these immediate obligations because its assets are predominantly loans or mortgages, which cannot be liquidated quickly. In such circumstances, the LOLR stabilises the system by providing additional liquidity.

[6] For discussion as to whether the LOLR for the Euro Area should also backstop markets and sovereigns, see Paul De Grauwe, *Economics of Monetary Union*, 10th Edition (OUP, 2014). For a direct response, see Paul Yowell, 'Why the ECB Cannot Save the Euro', in *Legal Challenges in the Global Financial Crisis*, ed. Wolf-Georg Ringe and Peter Huber (Hart Publishing, 2015), pp.81-120..

The modern banking sector is especially vulnerable to liquidity crises due to three major faultlines: fractional reserve banking, low levels of equity and the mismatch between bank liabilities and assets. Each is discussed in turn.

Fractional reserve banking allows banks to lend much more than they hold in deposits, thus facilitating investment across the economy. It is 'the basis for a modern monetary system' but carries a clear risk: banks can repay only a fraction of their depositors at a given time.[7] A bank therefore depends on savers' trust that deposits are safe; the loss of that trust leads to a bank-run as savers rush to withdraw their deposits.[8] In a bank-run, deposits transform from 'sticky' funding into sources of instability, as the bank is forced to liquidate its assets to meet depositor demands. The presence of a LOLR provides funding to banks experiencing a run, allowing it to meet demands without reducing assets. Furthermore, the presence of a LOLR reassures depositors that the bank does have access to funds and alleviates the anxiety that leads to a run in the first place.

The modern banking system is also built on very low levels of capital (the bank's equity). Bank leverage (the ratio of capital to assets) increased under Basel II, the global capital framework in operation prior to the global financial crisis, which permitted banks to tune their capital adequacy according to internally-designed models. Not surprisingly, banks preferred models which allowed them to take on more debt, in order to increase profits. By 2007, the capital of many global banks was just 2-3 percent of their total assets, meaning that these banks could only absorb a small devaluation in their assets before becoming insolvent. As Admati and Hellwig comment, 'the fact that these margins for safety were so thin played a major role in the crisis', by magnifying the overdue (re-)discovery, following the collapse of Lehman Brothers in 2008, that lending to banks

7 Niall Ferguson, *The Ascent of Money: A Financial History of the World* (Penguin, 2012), pp.51-2. On the (especially low) reserve requirements in Europe, see Anat Admati and Martin Hellwig, *The Bankers' New Clothes: What's Wrong with Banking and What to Do about It* (Princeton University Press, 2014), p.92, n.43.

8 State or industry deposit guarantee schemes mitigate, but do not eliminate, this dynamic. Furthermore, rational depositors are incentivised to withdraw their deposits as soon as risk materialises, as depositors are unsecured creditors and occupy a low position on the 'insolvency waterfall'.

can be risky.[9] Furthermore, prior to the crisis, banks had oriented their funding models towards short-term lending from money market funds (MMFs). MMFs are not covered by deposit insurance and therefore reacted adversely to their sudden awareness of risk in the banking system; they rapidly reducing lending to banks.[10] The 'sudden stop' of MMF-lending created a liquidity crunch which threatened banks' abilities to meet current obligations,[11] forcing the central banks of the developed economies, as LOLRs, to provide alternative sources of funding. Such a backstop is crucial to an industry with a (deplorably) low safety buffer and which is vulnerable to abrupt swings in investor confidence.

The third fault-line is inherent to banking itself. Bank liabilities (deposits and loans) are more liquid and more short-term than bank assets (traditionally, loans to businesses or households). Bank balance sheets therefore have a mismatched maturity structure and even temporary distrust amongst investors can be destructive: deposits can be withdrawn on demand but profits from loans may not be realised for years.[12] A bank may be forced to respond to a liquidity crunch by liquidating its assets quickly, leading to a 'fire sale'. This can be destabilising for the entire system, as asset prices drop and investors question the viability of banks holding similar assets, perhaps also forcing them into fire sales. Just such an 'amplifying process' was a feature of the global financial crisis.[13] The presence of a LOLR reduces the likelihood of fire sales by providing banks with funding during liquidity crises.

9 Admati and Hellwig (n.7), p.96. For the cultural transformation underpinning the assumed stability of financial 'institutions' and 'industry', see Marieke De Goede, 'Repoliticizing Financial Risk', *Economy and Society*, 33(2) (2004), 197-217, at 200-204.

10 Admati and Hellwig (n.7), p.66.

11 Paul de Grauwe, 'Design Failures in the Eurozone: Can They Be Fixed?', European Commission, Economic Papers 491 (April, 2013), p.5.

12 *ibid*, p.4; Admati and Hellwig (n.7), p.39.

13 Markus Brunnermeier, 'Deciphering the Liquidity and Credit Crunch 2007–2008', *Journal of Economic Perspectives*, 23(1) (2009), 77-100, at 91-8.

The nature of the banking sector therefore demonstrates a need for a LOLR and it can be considered 'the first line of defence' against a banking crisis.[14] That need is a public interest, due to banks' unique position in the economy. As intermediaries between savers and lenders, banks facilitate economic growth and job creation by providing businesses and households with loans for investment and spending. A banking crisis is extremely harmful as it leads to businesses and households being refused credit and damages business confidence.[15] In the EU, the economy is particularly beholden to the banking sector: bank assets totalled c.350 percent of the region's GDP in 2015 and over half the financial claims in the EU were on the balance sheets of banks.[16] The state therefore has a clear interest in providing a LOLR to prevent harm to the economy and general welfare resulting from avoidable banking crises.

Governments also have a more direct interest in preventing banking illiquidity from leading to insolvency; namely, that they are liable for resolving the latter. According to a Memorandum of Understanding concluded in 2008 between the EU institutions and national governments, liquidity crises are a responsibility of the central banks, but insolvency should result in either resolution or recapitalisation by the national treasuries.[17] The cost of recapitalisation imposes a significant burden on the taxpayer and can be damaging to a government's re-election prospects.[18] Despite this, during the financial crisis, when pushed, EU governments deemed the expense preferable to the unknown, potentially greater costs of allowing bank failures under inadequate insolvency

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14 Andres Tupits, *Legal Framework for the Eurosystem National Central Bank Analysis of the Eurosystem Central Bank Statutes*, Doctoral Thesis, Queen Mary University of London, p.170. See also Ulrich Bindseil, *Monetary Policy Operations and the Financial System* (OUP Oxford 2014), p.235.

15 The average fiscal and economic costs of 39 systemic banking crises have been placed at 12.5 and 14.6 percent of GDP, respectively. See Patrick Honohan and Gerard Caprio, 'Banking Crises', Institute for International Integration Studies, Discussion Paper No. 242 (January 2008).

16 Respective figures in the USA were 78 percent and 22 percent (significantly: less than the 25 percent accounted for by stock market funding). See Martin Sandbu, *Europe's Orphan: The Future of the Euro and the Politics of Debt*. (Princeton University Press, 2015), pp.85-6.

17 Memorandum of Understanding on Cooperation between the Financial Supervisory Authorities, Central Banks and Finance Ministries of the European Union on Cross-border Financial Stability, 2008.

18 The transfer of private sector failure to the public sector and the resultant politics of austerity has been described as the 'greatest bait and switch in modern history'. See Mark Blyth, *Austerity: The History of a Dangerous Idea* (OUP, 2015), p.73-4.

regimes.[19] The institutions responsible for managing illiquidity therefore have a strong negotiating position in relation to governments, which are 'on the hook' should bank illiquidity turn into bank insolvency.

The pronounced entanglement of the government, the economy and the banking sector is one reason why emergency measures to support the banking sector became so politically influential during the Eurocrisis. It also explains why the Euro Area has struggled 'to distinguish the interests of the banks from those of the state, let alone the population'.[20] The next section narrows the focus to ELA, by identifying it as part of the LOLR function.

B. ELA as part of the Lender Of Last Resort

The classic guide to acting as LOLR was set out by Walter Bagehot. He observed that central banks should respond to liquidity crises by lending 'freely' against collateral which would be 'good' under normal market conditions, but at a penalty rate to discourage 'unreasonable timidity' (i.e. to encourage banks to seek market financing first).[21] A more modern view of the LOLR accommodates a wider set of practices than that specified by Bagehot, some of which do not even require any positive action on behalf of the central bank. For example, as Bindseil observes, the LOLR, unlike other participants in the market, does not restrict its normal lending practices in the face of uncertainty and its 'inertia' results in banks drawing on greater volumes of central bank liquidity when other sources run dry.[22] Should central bank inertia not provide sufficient liquidity, then non-standard policy instruments may also be utilised to inject additional liquidity. From 2008, central banks across the globe responded to the financial crisis by providing a 'wall of money' through various initiatives, such as purchasing securities directly from the market or stimulating

19 Whether this was the right choice, how it was managed, its legacy and whose interests it served remain, of course, very contentious questions. Between 2008-2013, the Euro Area financial sector received 5.1 percent of region's 2013 GDP in 'bail-outs', ranging from 0 percent in some countries (relative to their own GDP) to 37.3 percent in Ireland. See ECB, 'Financial Assistance Measures in the Euro Area from 2008 to 2013: Statistical Framework and Fiscal Impact', Statistics Paper Series (April 2015), p.19.

20 *ibid*, p.87.

21 Walter Bagehot, *Lombard Street: A Description of the Money Market* (Scribner, 1873), Chapter 7.

22 Bindseil (n.14), p.235.

lending to the real economy through larger and longer-term loans to banks. In the Euro Area, the most significant in terms of sheer volume were the ECB's Long Term Refinancing Operations (LTROs), conducted in 2011 and 2012. The LTROs were three-year loans allocated at full-allotment, fixed-rate auctions, which was a marked change from the usual practice of short-term loans at variable-rate tender, and provided more than EUR 1tn of additional liquidity.[23]

Bagehot's original formula remains relevant to contemporary understandings of ELA. It is emergency lending to specific entities in response to sudden market shocks, i.e. a lifeline for very illiquid banks.[24] ELA is a bilateral extension of credit, against collateral which may not qualify for the central bank's other operations but (typically) at a higher rate of interest. It is generally accepted that ELA should be extended to illiquid but otherwise solvent firms, at the central bank's discretion.[25] Illiquidity and insolvency stand in a complex relationship and an accurate diagnosis during a banking crisis is difficult; the former may be symptom or a (preventable) cause of the latter.[26] In the Euro Area, the requirement for banks to be illiquid but otherwise solvent is crucial, due to the prohibition of monetary financing (see Section 3.D.ii).

Central banks cultivate a degree of 'constructive ambiguity' in their frameworks for ELA provision, so as to ward-off moral hazard.[27] The intention is to prevent banks from being certain that they will receive ELA and to preserve the central bank's discretion whether to provide it. Without this, it is feared that banks' incentives to pursue prudent business models would be weakened, as they would factor-in emergency support in advance. In addition, lenders to banks would conduct less

23 Grégroy Claeys, 'The (not So) Unconventional Monetary Policy of the European Central Bank since 2008', European Parliament, DG for Internal Policies (IP/A/ECON/2014-02), p.6.

24 See Paul Tucker, 'The Repertoire of Official Sector Interventions in the Financial System: Last Resort Lending, Market-Making, and Capital' (Bank of Japan International Conference, 2009).

25 See Rosa Lastra, 'Central Bank Independence and Financial Stability', Banco de Espana, Estabilidad Financiera 18 (2010), 51-66, at 62-3; Pierpaolo Rossi and Valentina Sansonetti, 'Survey of State Aid in the Lending Sector: A Comprehensive Review of Main State Aid Cases', *European Business Law Review*, 18(6) (2007), 1353-94, at 1356; Bindseil (n.14), pp. 242-6. For discussion of the 'penalty rate', see Charles Goodhart, 'Myths about the Lender of Last Resort', International finance, 2(3) (1999), 339-60, at 341.

26 For an original perspective, see *Financial Times*, 'Illiquid, Insolvent, What's the Difference?' (30 September 2014), http://ftalphaville.ft.com/2014/09/30/1988932/illiquid-insolvent-whats-the-difference/.

27 Steinbach (n.2).

thorough risk assessments of their sustainability before lending, thus weakening the market mechanism. In practice, however, large banks (and their creditors) are aware that public authorities are strongly incentivised to support large banks with all means at their disposal. ELA might be perceived as discriminatory against smaller banks for this reason.[28]

To summarise, ELA is distinguished from the wider activities of the LOLR by its bilateral and discretionary nature and the fact it is provided to illiquid but otherwise solvent banks. In comparison, the other activities of the LOLR are typically announced in advance, conducted according to a detailed framework and open to any qualifying counterparty. These features remain central to the provision of ELA in the Euro Area, but their transposition to the supranational level generates new problems. The following section explores how the legal framework of EMU incorporates ELA.

3. ELA in the Eurosystem

This section locates ELA in the legal framework for the European System of Central Banks (ESCB). As a primer on terminology, the ESCB includes all the national central banks (NCBs) of the EU and the ECB, whereas the Eurosystem is the operative part of the ESCB, i.e. the NCBs of the Euro Area and the ECB. The Statute of the European System of Central Banks and of the European Central Bank (the Statute), which is annexed to the Treaty on the Functioning of the European Union (TFEU) as Protocol No. 4, envisages a distinction between Eurosystem/non-Eurosystem tasks, with the ECB enjoying stronger powers of control over the former. The provision of ELA falls amongst the latter, however. This Section therefore seeks to identify and evaluate the provisions which enable the ECB's oversight of ELA and permit its far-reaching interventions. The trajectory of this Section is from description to argument.

28 Bindseil (n.14), p.235.

It progresses by briefly introducing the tasks and objectives of the ESCB, before comparing the degree of control exercised by the ECB over Eurosystem and non-Eurosystem tasks. The designation of ELA as a non-Eurosystem task is then considered, as this seems surprising for such a crucial instrument. The ELA Procedures, a soft law instrument of uncertain legal authority published by the ECB in 2013, is then analysed to consider how it blurs the distinction between Eurosystem and non-Eurosystem tasks. Even this blurring does not provide for the far-reaching nature of the ECB's interventions in ELA during the Eurocrisis, however. The provisions which enable such intervention are found in the TFEU as part of the general architecture for monetary policy in the Euro Area: central bank independence and the prohibition of monetary financing. The Section concludes by proposing that these Treaty-level norms dovetail with the Statute to enable the ECB's intervention in ELA, though not without limits.

A. Objectives of the Eurosystem

The objectives of the ESCB, set out in the EU's constitutional-level laws, the Treaties, indicate the ECB's foremost concerns and shape the limits of its mandate. Article 127(1) TFEU and Article 2 of the Statute of the European System of Central Banks and of the European Central Bank (the Statute) provide that the primary objective of the ESCB is to maintain price stability. The meaning of price stability is not defined, but Article 140 TFEU and Protocol 13 on the Convergence Criteria suggest that it means a stable rate of inflation.[29] Article 127(2) TFEU then states that the ESCB shall 'define and implement the monetary policy of the Union' and the ECB has defined price stability as a 'year on year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2%', though later clarifying – in response to concerns as to its deflationary bias – that the target is close to, but below, 2 percent.[30]

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29 On the ECB's 'auto-interpretation' of its inherently unattainable and forward-looking mandate, see Marijn van der Sluis, 'Maastricht Revisited: Economic Constitutionalism, the ECB and the Bundesbank', in *The Constitutionalisation of European Budgetary Constraints*, pp.105-24, at 117-19.

30 ECB, 'The Definition of Price Stability', https://www.ecb.europa.eu/mopo/strategy/pricestab/html/index.en.html. It is worth noting that the HICP

The primacy of price stability contrasts with other central banks, such as the Federal Reserve Bank of the USA, which has a dual mandate for stable prices and maximum employment. The Eurosystem is also directed, however, by Article 127(1) TFEU to 'support the general economic policies in the Union', provided that such support does not 'prejudice' price stability. The wording of the secondary objective implicitly acknowledges that the Member States retain competency for their own economic polic*ies*, with the EU enjoying only a coordinating competence under Article 5 TFEU to formulate 'broad guidelines'.

As well as its primary and secondary objectives, the ECB should 'contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system' (Article 127(5) TFEU). Price stability and financial stability are mutually reinforcing, as steady and predictable inflation should encourage saving, increase business confidence, mitigate against asset bubbles and assist banks to establish sustainable profits, while financial stability reduces the risk of a banking collapse and subsequent economic shock, which could disrupt the pursuit of price stability. Financial and price stability may conflict in certain circumstances, however.[31] In particular, if a liquidity squeeze leads the central bank to act as LOLR in order to stabilise the financial system, the monetary base is increased and higher inflation may follow. The central bank could, suggests Radtke, be forced to choose the lesser of two evils: financial instability or volatile inflation.[32] In mitigation, it must be noted that the post-2008 provision of huge volumes of liquidity by the developed economies' central banks has not resulted in a higher-than-normal rate of inflation and, in the Euro Area, a persistently low rate of inflation is of greater concern.[33]

does not include owner-occupied house prices or financial assets, suggestive of how technocratic acronyms are not unpolitical.

31 Helmut Siekmann et al, *Kommentar zur Europäischen Währungsunion*, 1st Edition (Mohr Siebeck, 2013), p.943.

32 Sylvia Radtke, *Liquiditätshilfen im Eurosystem: Zentralbanken als Lender of Last Resort* (Sellier, 2010), pp.127-8.

33 See n.6 for discussion of why.

Article 127(5) TFEU also tasks the ESCB with contributing to work of the competent authorities responsible for the prudential supervision of banks. Article 127(6) TFEU allows the Council to confer 'specific tasks' on the ECB in this field. One of the most significant post-Crisis reforms in the Euro Area has been the construction of the Single Supervisory Mechanism (SSM) through secondary legislation, which makes the ECB itself the competent authority for certain aspects of prudential supervision, thus transferring oversight of the Euro Area's most important banks to the ECB.[34]

In summary, the Eurosystem's primary objective is the pursuit of price stability. Without prejudice to this objective, the Eurosystem shall contribute to the general economic policies in the EU and to policies aimed at prudential supervision or the stability of the financial system. These broad objectives will be returned to later in the discussion, particularly in Section 4.

B. Eurosystem and non-Eurosystem tasks (ELA as the latter)

Although the Eurosystem's objectives indicate its priorities, they do not disclose its actual tasks. These are set out in Article 127(5) TFEU and Article 2 of the Statute:

- to define and implement the monetary policy of the Union;
- to conduct foreign-exchange operations […];
- to hold and manage the official foreign reserves of the Member States;
- to promote the smooth operation of payments systems.

Under Article 14.4 of the Statute, the NCBs may also perform other tasks, provided they do not interfere with those of the Eurosystem:

[34] This will likely alter the dynamics of ELA provision in the future. For some initial thoughts, see Christos Gortsos, 'Last Resort Lending to Solvent Credit Institutions in the Euro Area before and after the Establishment of the SSM', ECB Legal Conference 2015: From Monetary Union to Banking Union, on the way to Capital Markets Union, 53-76, www.ecb.europa.eu. See also Steinbach (n.2), 379-80.

> [NCBs] may perform functions other than those specified in this Statute unless the Governing Council finds, by a two-thirds majority of the votes cast, that these interfere with the objectives and tasks of the ESCB. Such functions shall be performed on the responsibility of [NCBs] and shall not be regarded as part of the functions of the ESCB.

Article 14.4 of the Statute reflects how the NCBs were highly integrated into their domestic political and economic frameworks before becoming members of the Eurosystem. They performed a variety of roles in their national contexts. Article 14.4 is a 'protection clause' for the NCBs, which recognises the existence of Eurosystem and non-Eurosystem tasks, but ensures the pre-eminence of the former through a Governing Council oversight mechanism.[35] The Governing Council is responsible for formulating monetary policy in the EMU and consists of the Governors of the NCBs of the Eurosystem alongside the six members of the Executive Board, which is responsible for implementing monetary policy according to Governing Council directions and includes the President of the ECB.

ELA provision was designated as a non-Eurosystem task from an early stage in the single currency's establishment. The ECB's Annual Report for 1999 notes that 'the competent NCB takes the decision concerning the provision of ELA to an institution operating in its jurisdiction…under the responsibility and at the cost of the NCB in question', which clearly locates it under Article 14.4 of the Statute.[36] Although Article 14.4 provides the Governing Council of the ECB with a power of objection over ELA provision, it may be surprising – with the benefit of hindsight – that such a critical function does not fall more clearly within the Eurosystem.

On the other hand, ELA may be such a critical function that national authorities are unwilling to surrender it. As noted above (Section 2.A), systemic banking crises can be extremely costly for

[35] Radtke (n.32), p.119.
[36] ECB, 'Annual Report, 1999', p.98. For subsequent statements, see ECB, Monthly Bulletin (February 2007), p.80; ECB, 'The Financial Risk Management of the Eurosystem's Monetary Policy Operations' (July 2015), pp.34-6.

national treasuries. In the absence of a shared budget for bank failures, national authorities may have been reluctant to transfer responsibility for ELA to the supranational-level, as doing so would leave Member States more exposed to the costs of decisions over which they had less influence. The new supranational framework for bank resolution, the Single Resolution Mechanism (SRM), which incorporates a degree of cost-sharing for bank failure, alongside the ECB's access to granular bank data through the SSM, may allow this issue to be revisited.

That said, a further hurdle would have to be cleared before ELA could become a Eurosystem task. Under the Statute, if ELA was a Eurosystem task, the Euro Area would have to confront the possibility of loss-sharing should banks default on ELA and their collateral prove insufficient (see Section 3.C.iii). In contrast, loss-sharing is expressly ruled-out under Article 14.4. of the Statute. Not only would loss-sharing be politically explosive in some Member States, where the Euro is already perceived as having exposed taxpayers to the costs of another country's debts, its presence would arguably increase moral hazard, both on the part of the banks and their NCBs, and thus increase the likelihood of ELA being needed.

Given these concerns, ELA as a non-Eurosystem task may be the least worst option. Especially since many NCBs, at the outset of monetary union, performed prudential supervision in their domestic context, meaning that they had access to data about banking stability, channels of communication with banks and related enforcement powers. In addition, the scale of the Eurocrisis and the potential for cross-border contagion of financial instability in the monetary union was not foreseen. It is consistent with the general principle of subsidiarity in the European Union that the NCBs provide ELA in response to national banking crises, with the Governing Council only assuming a power of objection to defend the supranational tasks and objectives of the ESCB. Furthermore, if the potential for cross-border banking crises in EMU was under-appreciated before 2008, then there would have been little appetite for the ECB to become embroiled in national banking crises, which are, by nature, highly politicised. The ECB's supranational objectives and independence (see Section 3.D.i) are unsuited to such close involvement in national debates; as this paper will argue, its turn towards a more interventionist approach during the Eurocrisis was only justified by the cross-border escalation of the crisis.

For the above reasons, it was not felt appropriate for direct responsibility for the provision of ELA to reside with the ECB. Over the course of the Eurocrisis, however, it has, in some circumstances, managed the provision of ELA in a very hands-on fashion. Several problematic issues arise from this. First, there is a danger that the ECB blurs the distinction between Eurosystem and non-Eurosystem tasks, thus cutting against the grain of the Treaties, by adopting a more granular oversight of ELA provision (see Section 3.C). Second, the ECB's has used its oversight of ELA to pressure governments into policies which fall outside the ECB's competence (see Section 4.B and 4.C). Third, given the absence of a clear legal framework (note: to be distinguished from a multi-layered legal justification, which this paper argues does exist) to support the ECB's more interventionist approach, there is a risk that the ECB operates in the margins of the law, interpreting its own powers too freely (see Section 3.C.v). Finally, in an issue only explored very briefly by this paper, the adequacy of the ECB's accountability to taxpayers must be called into question (see Section 4).

C. ELA as a non-Eurosystem task: sharp or blurred distinction?

The distinction between Eurosystem and non-Eurosystem tasks is not merely symbolic. The Treaties provide a detailed framework allowing the ECB to define the former and to instruct and monitor the NCBs in their performance of them, but they are more reticent regarding the latter. This section compares the legal framework for Eurosystem and non-Eurosystem tasks and considers whether the framework for ELA is consistent with this distinction. The Section begins by describing the framework in general, identifying and explaining key provisions, before evaluating the issues raised and proposing a legal justification for the ECB's interventionist approach to ELA (its actual interventions are assessed in Section 4).

i. *Allocation of tasks*

Article 9.2 of the Statute provides a framework for conducting the tasks and achieving the objectives set out in Article 127 TFEU through the Eurosystem:

> The ECB shall ensure that the tasks conferred upon the ESCB under Article 127(2), (3)[37] and (5)[38] of the [TFEU] are implemented either by its own activities pursuant to this Statute or through the [NCBs] pursuant to Articles 12.1 and 14 [of the Statute].

The ECB is responsible for the allocation of the Eurosystem's tasks to the NCBs or to its own central level. It is also responsible for ensuring that implementation is actually achieved ('implement*ed*'), which implies an oversight and even enforcement role. The ECB's disciplining powers manifest in Article 35.6 of the Statute, which directs the ECB to ensure that NCBs fulfil their obligations under the Statute and the Treaties and permits the ECB to bring a NCB before the Court of Justice (CJEU). The ECB, in this capacity, is comparable to the Commission when acting as 'Guardian of the Treaties'.[39] It is a necessary role, given that the Statute envisages the performance of the tasks of the Eurosystem through the NCBs in a decentralised manner, yet in the service of a 'single monetary policy'.

There are consequently parallels, inside the Eurosystem, of the ECB's oversight of non-Eurosystem functions in Article 14.4 of the Statute, but Articles 12.1 and 14 of the Statute demonstrate some clear differences. The third paragraph of Article 12.1 provides that:

> To the extent deemed possible and appropriate and without prejudice to the provisions of this Article, the ECB shall have recourse to the [NCBs] to carry out operations which form part of the tasks of the ESCB.

37 A proviso clarifying that the Eurosystem's responsibility to maintain the official foreign reserves of the Member States does not prevent the governments of the Member States from managing foreign-exchange 'working balances'.

38 I.e. contributing to financial stability.

39 Radtke (n.32), p.125.

The presumption is that tasks will be performed by the NCBs 'to the extent deemed possible' and a principal-agent relationship is implied: the ECB 'shall have recourse to the [NCBs]'.[40] The NCBs are therefore to be utilised in the pursuit of shared goals, as instruments of the ECB.[41] In doing so, they will be implementing the frameworks and objectives decided in the Governing Council. In contrast, when operating under Article 14.4, the NCBs conduct tasks not foreseen by the Eurosystem. The dynamic is therefore reversed: as regards Eurosystem tasks, the NCBs respond to direction from the ECB but, under Article 14.4, the Governing Council responds to NCB actions.

ii. *ECB legal acts*

The range of legal acts available to the ECB for the purpose of directing NCBs in the fulfilment of Eurosystem tasks is a further point of difference. The legal acts of the ECB are set out in Article 34.1 of the Statute. The ECB may adopt regulations in pursuit of certain tasks, 'take decisions necessary for carrying out the tasks entrusted to the ESCB' and 'make recommendations and deliver opinions'. As implied by their name, opinions and recommendations are non-binding, though they can be persuasive.[42] They are typically directed at national authorities, governments or other EU institutions, either when the ECB is consulted on a proposed change of national law under Article 127(4) TFEU, or on a self-initiated basis.

The ECB also has recourse to the legal acts set out in Article 12 of the Statute. The Governing Council may adopt guidelines 'necessary to ensure the performance of the tasks entrusted to the ESCB'. These are typically directed at the Executive Board (which is charged with implementing monetary policy according to the Governing Council's guidelines and decisions) under Article 12.1 of the Statute, or at the NCBs under Article 14.3. As Zilioli and Selmayr observe, it is not entirely

[40] Siekmann and others (n.31), pp.938-9.

[41] See Chiara Zilioli and Martin Selmayr, *The Law of the European Central Bank* (Hart Publishing, 2001), p.126: 'Even indirect implementation is therefore always centralised implementation under the control of the ECB'. On the origin of Article 12.1, see Carel van den Berg, *The Making of the Statute of the European System of Central Banks: An Application of Checks and Balances* (2004), pp.306-17.

[42] Zilioli and Selmayr (n 41). See also n.73.

clear whether ECB guidelines should be considered as binding. On the one hand, Article 17.3 of the Rules of Procedure implies that the Governing Council has 'normative powers' to ensure their implementation. On the other, the English, Spanish, French and Italian language versions of the Statute and Treaties suggest that 'guidelines' are only indicative.[43]

However, the Executive Board may also issue binding instructions to the NCBs under Article 12 of the Statute. Given that guidelines and instructions are addressed to the Executive Board or to NCBs, they cannot require legislative changes and any effects on third parties result, in a second-order fashion, from changes to the ECB or NCBs' administrative frameworks.

iii. *Article 14*

Article 14 of the Statute contains various provisions relevant to NCBs. Article 14.1 reiterates the obligation of Article 131 TFEU for each Member State to ensure that the statute of its NCB is compatible with the Treaties and the Statute. Article 14.2 sets the minimum period of appointment for the NCB governors and the conditions on which they may be removed. Article 14.3 is concerned with the NCBs' performance of Eurosystem tasks:

> The [NCBs] are an integral part of the ESCB and shall act in accordance with the guidelines and instructions of the ECB. The Governing Council shall take the necessary steps to ensure compliance with the guidelines and instructions of the ECB and shall require that any necessary information be given to it.

Once again, the NCBs' identity as an agent of the Governing Council is emphasised. The existence of guidelines and instructions emanating from the ECB is cited to exemplify the status of the NCBs as 'integral part[s]' of a larger whole, thus reinforcing the key distinction between Eurosystem and non-Eurosystem functions as the ECB's capacity to set, in detail, the terms under which the NCBs conduct the former. Article 14.3 also vocalises the implicit second strand of the ECB's responsibilities under Article 9.2 of the Statute, which indicates that the ECB assumes an

43 *ibid*, p.104.

oversight role to ensure that the ESCB's tasks are 'implement*ed*'. Accordingly, in Article 14.3, the Governing Council is charged with monitoring the NCBs' compliance with the legal framework of the Eurosystem. The NCBs must provide the information needed for the ECB to perform this role.

Article 14.4 has already been introduced. It permits the NCBs to perform non-Eurosystem functions, provided the Governing Council does not object:

> [NCBs] may perform functions other than those specified in this Statute unless the Governing Council finds, by a two thirds majority of the votes cast, that these interfere with the objectives and tasks of the ESCB. Such functions shall be performed on the responsibility of [NCBs] and shall not be regarded as being part of the functions of the ESCB.

In contrast to the broad typology of legal acts available to the ECB in relation to its Eurosystem tasks, the form of the Governing Council's objection under Article 14.4 is not specified. However, we now know that the Governing Council's objection takes the form of a decision. In March 2013, a press release regarding ELA in Cyprus was headed: 'Governing Council decision on [ELA] requested by the Central Bank of Cyprus' and the ECB listed this 'decision' in its summary of legal acts adopted in March 2013.[44] Subsequent documents have also confirmed that the Governing Council's interventions under Article 14.4 are decisions.[45] The legal texts available to the ECB when exercising its oversight of non-Eurosystem functions therefore appears very limited in comparison to the range of binding and non-binding acts available to allocate and monitor tasks

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44 ECB, 'Liquidity Assistance Requested by the Central Bank of Cyprus', www.ecb.europa.eu; 'Decisions taken by the Governing Council of the ECB (in addition to decisions setting interest rates)', March 2013, https://www.ecb.europa.eu/press/govcdec/otherdec/2013/html/gc130322.en.html.

45 See the letters from 2010 between the (then-)President of the ECB and the (then-)Minister for Finance of Ireland: ECB, 'Letter of the ECB President to the Irish Minister for Finance Dated 19/11/2010 on the Large Provision of Liquidity by the Eurosystem and the Central Bank of Ireland to Irish Banks and the Need for Ireland to Agree to an Adjustment Programme' (19 November 2010); 'Letter of the ECB President to the Irish Minister for Finance Dated 15/10/2010 on the Large Provision of Liquidity by the Eurosystem and the Central Bank of Ireland to Irish Banks' (15 October 2011). Both available on the ECB website. See also *Alcimos Consulting SMPC v European Central Bank*, T-368/15 R and the related documents available on www.alcimos.com. For discussion of this litigation and of the non-public nature of the Governing Council's decisions regarding ELA, see Kilpatrick (n.1).

within the Eurosystem. In addition, whereas Article 14.3 authorises the ECB to request information from the NCBs and obliges them to provide it, Article 14.4 is silent on how the ECB should obtain sufficient information to ensure its oversight role is effective.

Radtke has described Article 14.4 as a 'protection clause' for NCBs, due to the high threshold required before the Governing Council can intervene in non-Eurosystem activities;[46] not only must the Governing Council, which functions on a one member-one vote basis (though with a rotating quorum of voting members), reach a majority of two thirds, it must also find that the non-Eurosystem function actually does interfere with the tasks and objectives of the ESCB.[47] Significant consensus regarding material interference is therefore the apparent threshold for Governing Council to intervene in non-Eurosystem tasks.

A crucial aspect of Article 14.4 is that the financial risks of non-Eurosystem tasks are assumed by the NCB in question. Non-Eurosystem functions 'shall be performed at the responsibility and liability of the [NCBs]', meaning that the possibility for loss-sharing across the Eurosystem is not available. In contrast, Article 32.4 of the Statute provides that 'the Governing Council may decide that [NCBs] shall be indemnified against…specific losses arising from monetary policy operations undertaken for the ESCB'. Loss-sharing in relation to Eurosystem tasks was indeed activated several times in 2008, in relation to defaults on the Eurosystem's liquidity-providing operations with Lehman Brothers, Bankhaus AG, Indover NL and three subsidiaries of Icelandic banks.[48] In these instances, the exposed NCBs were indemnified following a determination by the Governing Council that 'the monetary policy operations in question were carried out by these NCBs in full compliance with the Eurosystem's rules and procedures, and that these NCBs had taken all the necessary precautions, in full consultation with the ECB and the other NCBs, to maximise the recovery of funds from the collateral held.'[49]

46 Radtke (n.32), p.119.
47 *ibid*, p.123.
48 See ECB, 'Eurosystem Monetary Policy Operations in 2008' (5 March 2009).
49 *ibid*.

A comparable mechanism does not exist for ELA provided as a non-Eurosystem function (at least, not on the basis of presently public information), perhaps in order to avert moral hazard, both on the part of the Member State concerned and of the market. As regards the former, given the extensive national costs attendant on banking failure, loss-sharing for ELA could become a back-door transfer mechanism in which a Member State can benefit from the profits of an overextended banking sector, but diffuse the costs of failure across the Euro Area. As regards the latter, the market may be more inclined to assume access to ELA if it feels that the NCB will be less cautious with its provision, due to the availability of loss-sharing. Political realities, past and present, also mobilise against loss-sharing for ELA. Although the potential for cross-border contagion in the Euro Area is now clear, attitudes towards risk-sharing in the 'creditor' Member States continue to harden, making support for loss-sharing unlikely.

The corollary of rejecting loss-sharing, however, is to raise the prospect that individual states may be forced to leave the Euro Area if their NCBs suffer major losses on ELA. Given that losses on ELA cannot, according to the publicly available framework, be shared across the Eurosystem, a NCB suffering large losses would require recapitalisation by its national government, which is the default position in countries with a single central bank, single government and own currency.[50] The ECB endorsed this position when advising that governments of crisis-hit countries should provide a guarantee of losses on ELA suffered by their NCBs. Unfortunately, this is a Catch-22. The poisonous nexus, revealed by the Eurocrisis, between a government's fiscal strength and the stability of its banks means that Member States afflicted by the sovereign debt crisis also faced banking crises. These Member States' fiscal credibility would not have easily absorbed the additional burden of issuing more debt to recapitalise their NCBs. A consequence of large losses on ELA would therefore have been to risk that the government exit the Euro Area in order to recapitalise its NCB in a new (or resurrected) national currency. The mere existence of this risk

50 Willem Buiter, 'Can Central Banks Go Broke?', CEPR, Policy Insight No.24 (May, 2008), p.10.

may increase the likelihood of it coming to fruition, as investors are provided with another incentive to reduce their exposures to crisis-hit Member States. Investors may, for example, decrease their positions in the debt of such Member States, or transferring saving elsewhere, thus further weakening the Member State in question.

An additional argument in favour of loss-sharing for ELA could be premised on the manner in which the Governing Council has utilised its oversight of ELA during the Eurocrisis. In Ireland and Cyprus (and, less expressly, Greece), ELA was permitted to continue once a financial assistance programme was in place which reassured the ECB as to the future solvency of these Member States and their banks (see Section 4). Having helped, as part of the Troika, to negotiate – and thereby tacitly approved – the EAPs on which these assessments were based, the ECB should extend at least the possibility of loss-sharing for any post-bail-out recourse to ELA, particularly if the Member State in question has fully implemented its EAP up to that point.

iv. *ELA Procedures*

Having described the division of responsibility for Eurosystem and non-Eurosystem tasks in the Statute, attention now turns to the 'ELA Procedures', an undated, two-page document setting out a procedure for the provision of ELA, which appeared on the ECB's website in 2013.[51] The ELA Procedures are part of the 'mechanisms' agreed between the ECB and NCBs to regulate ELA provision from an early stage in the ESCB's development, as announced in the ECB's 'Annual Report' of 1999.[52] Whether the Procedures complete these mechanisms, when they were drafted and whether important parts remain unpublished is not clear. This Section will describe the key features of the Procedures, before evaluating their effects and considering whether the Procedures, in combination with the provisions of the Statute already described, enable the far-reaching interventions of the ECB during the Eurocrisis.

51 ELA Procedures (the procedures underlying the Governing Council's role pursuant to Article 14.4 of the Statute of the European System of Central Banks and of the European Central Bank with regard to the provision of ELA to individual credit institutions), www.ecb.europa.eu.

52 ECB, 'Annual Report' (n.36), p.98.

The ELA Procedures set out a framework for ensuring that the Governing Council is provided with information by the NCBs to monitor whether their provision of ELA threatens the Eurosystem's tasks and objectives. Different reporting requirements are detailed for three thresholds of ELA provision to a 'given financial institution or group of financial institutions'. For any amount up to EUR 500m, a standard list of information must be provided to the Governing Council 'at the latest, within two business days of the operation being carried out'. The standard list of information is composed of nine elements, including the collateral against which ELA is provided and the haircuts applied, the reasons for ELA provision and a liquidity and solvency assessment by the prudential supervisor. For any extension above EUR 500m, the Governing Council should be informed 'as early as possible prior to the extension'. Finally, for any amount above EUR 2bn, the NCB should provide the Governing Council with the standard list of information as well as an additional 'projection…of the funding gap for each individual bank which is to receive ELA on the basis of…the expected scenario and a stress scenario'. At all three thresholds, the standard list must be updated daily by the NCB concerned, thus providing the Governing Council with a window through which to monitor the volume of ELA provided, the quality of collateral and the solvency assessment of the prudential supervisor.[53]

The ELA Procedures raise three issues. First, the ECB adopts a functional interpretation of Article 14.4 by asserting that it requires detailed information on a regular basis 'to enable the Governing Council to adequately assess whether [a non-Eurosystem function interferes with the tasks and objectives of the ESCB]'. As discussed, a comparison of Article 14.3 and 14.4 of the Stature indicates that one difference between Eurosystem and non-Eurosystem tasks was the obligation for NCBs to provide all necessary information to the ECB regarding Eurosystem tasks. The ELA Procedures appear to elide this distinction, as the NCBs are required to provide granular information to the Governing Council on a daily basis.

53 Post-SSM, for systemically important financial institutions, the relevant authority for the largest banks will be the ECB.

Second, the ELA Procedures establish a framework for ex ante review of NCB action under Article 14.4. The NCB is required to notify the ECB in advance if it will provide ELA in volumes above the second or third threshold. A switch from ex post non-objection to ex ante approval by the Governing Council is therefore implied, though the wording of the ELA Procedures suggests this need not be the case. At the middle tier, the ELA Procedures do not envisage anything further than notification of the Governing Council and do not require the NCB to wait for approval. For the final tier, the Governing Council does assume further powers, such as the power to set, at the request of the NCB concerned, a limit and a pre-specified period of time, below and during which it will not object to further ELA. At neither tier does the Governing Council gain powers of ex ante approval. Instead, the Governing Council is required to 'consider whether there is a risk that the intended ELA may interfere with the tasks and objectives of the Eurosystem'. Consideration does not mean that the Governing Council must approve of the ELA provision in order for it to proceed, as the language of the ELA Procedures deviates here from that used in Article 14.4 of the Statute, which permits the Governing Council to object to continued ELA provision if it finds that it does actually interfere with the tasks and objectives of the ESCB – and sets a voting threshold of a two-thirds majority. The formulation used in the ELA Procedures ('consider whether there is a risk that the intended ELA provision may interfere…') therefore sets a lower bar in substantive terms and does not set a procedural bar, implying that notification is intended to stimulate debate, information-sharing and consensus amongst members, rather than a hard vote. The ELA Procedures, according to this literal reading, do not necessarily disturb the premise of Article 14.4 as one of ex post objection, since this can be distinguished from the promotion of ex ante approval. In addition, a process of ex ante consideration can be justified on a functional reading of Article 14.4. If the Governing Council has been granted a power of veto over ELA provision, and if ELA provision, by nature, takes place in a tense and fast-changing environment, the Governing Council may need information regarding ELA to be provided in advance in order to make its power of objection effective.

However, that semantic distinction does not seem to be borne out in practice. A summary of the ECB's financial risk management framework notes that 'in practice…all ELA requests are put before the Governing Council before the provision of ELA'.[54] This is a problematic statement, as it reconfigures the provision of ELA, supposedly a task of the NCBs outside the Eurosystem, into a request that is submitted to the Governing Council before ELA is provided. The ESCB's operational framework for the provision and oversight of ELA seems to diverge from the Treaties in a two-step process: first, the ELA Procedures transplant a power of ex ante Governing Council consideration into its oversight of a non-Eurosystem task, but, second, the careful wording of the ELA Procedures is not adhered to in practice, as notifications of forthcoming ELA to the Governing Council are transformed into a request. The ESCB's preference therefore appears to be to enable closer oversight of ELA, regardless of countervailing Treaty provisions.

Finally, the legal status of the ELA Procedures is unclear. They are not designated as a legal act by the ECB and yet appear to be intended to have binding force. They set granular reporting requirements and empower the NCB to request, and the Governing Council to grant, permissions not indicated by the Statute, such as a guarantee of non-objection for a period of time, provided ELA remains below an agreed threshold. The Procedures therefore blur the distinction between the framework for a Eurosystem and non-Eurosystem task and the ECB increases its influence in key policy fields (ELA and, by extension, a Member State's fiscal position) through a soft law instrument which seems to cut against intentions expressed in the Statute.[55] The following conclusion explores this problematic further.

v. *Conclusion: the effect of soft law*

That the ELA Procedures cut against the intention of the Statute to distinguish between the Governing Council's oversight of Eurosystem and non-Eurosystem tasks is clear by way of

54 ECB, 'The Financial Risk Management of the Eurosystem's Monetary Policy Operations' (n.36), p.34.

55 See Kilpatrick (n.1) for discussion of how unusual legal sources have increased the ECB's influence in the sovereign debt crisis.

comparison. Whereas Articles 9.2 and 12.1 of the Statute direct the ECB to, respectively, 'ensure that the tasks of the ESCB…are implemented' through the NCBs 'to the extent deemed possible' and Articles 12.1 and 34.1 provide a range of legal acts for this purpose, no executive body of the ECB is empowered by Article 14.4 to adopt further provisions regulating the NCBs' conduct of non-Eurosystem tasks. Likewise, Article 14.3 of the Statute directs the Governing Council to 'take necessary steps' to ensure the NCBs' compliance with Eurosystem tasks, but Article 14.4 creates no such imperative regarding non-Eurosystem tasks. Given that the Statute is annexed to the Treaties and forms part of the 'constitutional' layer of EU law, it is troubling, from a formal perspective, that the ECB has coordinated informal procedures of uncertain legal authority which blur a distinction expressly set out in the highest form of EU law.

That said, the substantive impact of the ELA Procedures themselves is limited, as they only appear to grant the Governing Council a power of ex ante consideration and the ability to set a ceiling on ELA provision over a short period of time. The ELA Procedures do not, therefore (as far as we know), disturb important differences between Eurosystem and non-Eurosystem tasks, such as the absence of loss-sharing or an ECB-designed 'front-to-back' framework for the provision of ELA.[56] Rather, it is the *tendency* represented by the ELA Procedures which raises concerns, for two reasons.

First, the legal authority of the ELA Procedures is ambiguous. They are undated and not codified in the Official Journal, having simply appeared on the ECB's website in 2013. They are 'soft law', being described as procedures or 'mechanisms', rather than as a decision, regulation or instruction.[57] Craig observes that soft law may be preferred when the parties are unwilling or unable

[56] Tupits (n.14) found, in 2010 that only nine out of (then-)27 NCBs in the EU had published detailed guidance on the provision of ELA and several were non-EMU Member States. The NCBs therefore seem to exercise discretion when it comes to designing a framework for ELA-provision. See pp.502-5.

[57] Article 12.1 of the Statute restricts the ECB's power to issue guidelines and instructions to Eurosystem tasks. Likewise, Article 34.1 permits regulations 'to the extent necessary to implement the tasks of the Eurosystem'. The ELA Procedures could be an atypical decision (following Zilioli and Selmayr's definition of an atypical decision as one without addressees but with 'regulation-like' effects, see n.41, p.97), given that Article 34.1 of the Statute permits decisions 'necessary for carrying out the tasks entrusted to the ECB'. The change in language is indicative of a greater leeway to issue decisions, as compared to regulations. Alternatively, the ELA Procedures could be substantially redrafted as a recommendation to NCBs to change their own procedures

to prescribe legally binding obligations but 'desire some form of regularised cooperation or coordination to deal with a recurrent problem, thereby reducing the transaction costs of ad hoc meetings'.[58] The ELA Procedures satisfy this aim by ensuring information-sharing and discussion amongst the Governing Council whenever ELA is provided, which is, almost by definition, a time of crisis during which coordination is desirable. The intention of the ELA Procedures is therefore understandable, based on a functional reading of Article 14.4, as they allow the Governing Council to oversee ELA in a meaningful manner. We should not forget, though, Snyder's warning that 'the use of soft law raises in a very acute way the problematic relationship between efficiency, legality and legitimacy'.[59] The ELA Procedures may be more efficient, but the deployment of unusual legal sources in a key policy area such as ELA undermines the Governing Council's legitimacy, as we expect more transparent rule-making where decisions can have such impact.[60]

Second, the ELA Procedures are indicative of the ECB's willingness to increase the scope of its influence through its oversight of ELA. This trend has already been noted in relation to how the Governing Council's power of ex ante consideration functions as an ex ante power of approval. It is further evidenced by the ECB's warnings, in 2010 and 2013, that ELA to Ireland and Cyprus, respectively, would be withdrawn unless they accepted a bail-out, suggesting that, in practice, the Governing Council's power of ex post objection under Article 14.4 of the Statute evolved into an ex ante warning of future objection. Once again, however, it must be emphasised that this evolution, in isolation, does not appear so controversial, as ex ante warnings can be accommodated under a functional reading of Article 14.4; i.e. they are less disruptive than an objection without warning and they encourage negotiations leading to the continuation of ELA on terms which do

regarding ELA provision to incorporate the substance of the Procedures, though this would not be a quick task given that many NCBs do not have (public) ELA frameworks.

58 See Paul Craig, *EU Administrative Law* (OUP, 2006), p.211.

59 Francis Snyder, 'Soft Law and Institutional Practice in the European Community', in *The Construction of Europe: Essays in Honour of Emile Noel*, ed. Stephen Martin (Springer, 1994), pp.197-225, p.219.

60 On the use of 'abnormal' sources of law in the Eurocrisis, see Kilpatrick (n.1). As Jan Klabbers concludes: 'we need to insist on a degree of formalism, because it is precisely this formalism that protects us from arbitrariness'. See 'The Undesirability of Soft Law', *Nordic Journal of International Law*, 67(4), (1998), 381-92, at 391

not interfere with the tasks and objectives of the Eurosystem. From the Governing Council's perspective, this is a good outcome.

That said, the development is indicative of the ECB's willingness to apply its powers under Article 14.4 in a pragmatic manner which is not expressly supported by the Treaties. Stefan's reminder that 'the practical effects of soft law include the transformation that soft law may generate in the behaviour and practices of the…institutions' is therefore very relevant, particularly in relation to a further innovation of the ECB in its oversight of ELA: the attachment of conditionality to the continuation of ELA in crisis-stricken Member States.[61] In these far-reaching conditions, which bind a government to fiscal consolidation and controversial social and labour reforms,[62] the legality of the Governing Council's intervention is less certain. We therefore reach a situation in which the ECB has slightly expanded its oversight powers through the ELA Procedures, but has empowered itself far beyond the new limits of this already-problematic soft law instrument, by using its oversight of ELA to make Member States an offer they can't refuse: continued ELA provision and the avoidance of banking collapse in return for the ECB's preferred model of economic reforms.

The question of the legality of the ECB's policy of conditionality as regards ELA has two aspects. First, whether the ECB can lawfully attach conditions to the continuation of ELA. Second, whether the ECB's actual interventions and the specific conditions it attached to ELA in practice were supported by the ECB's legal framework. The ELA Procedures certainly do not grant the ECB such extensive powers, as the only conditionality evident in them is that which allows the ECB to agree not to object to ELA provision below a specified volume for a set period of time.

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61 Oana Stefan, 'Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance', *Maastricht Journal of European and Comparative Law*, 21(2), (2014), 359-80, at 368. See also Snyder (n.59), p.220, who asks whether soft law channels or expands power.

62 See, for example, ECB, (n.54), in which the President of the ECB claims, in a (then) non-public letter to the Irish government that the ECB may 'impose specific conditions' on ELA and that, for it to be continued in Ireland, the government must commit to an EAP involving 'decisive actions in the field of fiscal consolidation'.

In contrast, Article 14.4 might enable some form of conditionality. It permits the Governing Council to object to ELA provision when it interferes with the tasks and objectives of the Eurosystem. It is therefore logical that the Governing Council can agree not to interfere with ELA provision provided that actions are taken to ensure that ELA does not interfere with these tasks and objectives. What is not clear from Article 14.4, however, is how this theoretical power is to be enabled. In particular: what is meant by 'interference' and what kind of conditions can the ECB attach? The following Section proposes an answer based on a reading of two 'higher level' central banking norms set out in the Treaties, central bank independence and the prohibition of monetary financing. It proposes a general legal justification for ECB intervention and conditionality, without considering whether the ECB's actual interventions in ELA during the Eurocrisis were lawful.

D. *Extension of EMU central banking norms to ELA*

Two central banking norms set out in the Treaties are crucial to the architecture of EMU, central bank independence and the prohibition of monetary financing. As will be argued, the former does not expressly extend to the performance of non-Eurosystem tasks, raising the importance of the latter, in the context of ELA, as the norm which enables the Governing Council to intervene in ELA provision by giving a clear basis for objection.

i. *Central bank independence*

The ECB's is granted a high degree of independence by the Treaties. Article 130 TFEU (and Article 7 of the Statute) provides that:

> When exercising the powers and carrying out the tasks and duties conferred on them by the Treaties and the Statute…neither the [ECB] nor a [NCB], nor any member of their decision-making bodies, shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body [all of which likewise] undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the [ECB] or of the [NCBs].

The Treaties therefore seek to insulate the ECB from political influence, at both a European and national level. This section provides a brief discussion of the ESCB's independence, focusing on its rationale and whether the NCBs should be considered equally independent when providing ELA.

The primacy of price stability, set out in Article 127(1) TFEU, is felt to justify the ECB's 'enhanced independence',[63] as it is felt (and has been empirically demonstrated) that central bank independence and inflation rates are negatively correlated.[64] Independence is therefore felt to improve the ECB's performance of its core task. A further argument is that price stability should not be a government responsibility, because it possesses the wrong incentives. For example, governments may pursue an inflationary policy in advance of elections, to stimulate short-term economic growth, try to inflate away debts or, if unable to issue debt, attempt monetary financing of the budget.[65]

Price stability is considered so important because variable inflation is damaging to the economy. It 'arbitrarily redistributes wealth among individuals' by, for example, changing the worth of a loan for creditors and debtors, reducing the real value of wages or penalising individuals on fixed pensions.[66] At its worst, inflation become hyperinflation, typically when governments seek to refinance themselves by forcing the central bank to create more money.[67] Hyperinflation is economically destructive and politically destabilising.

Articles 127(1) and 130 TFEU are therefore in a symbiotic relationship; EMU seeks to anchor price stability by entrusting it to an independent institution. The ECB's independence is especially robust, both formally and substantively. As regards the former, ECB independence is enshrined

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63 Tuori and Tuori (n.1), p.29.

64 For discussion, see Fabian Amtenbrink, *The Democratic Accountability of Central Banks: A Comparative Study of the European Central Bank* (Hart Publishing, 1999), p.15, n.25-6.

65 *ibid*, pp.12-15.

66 Nicholas Mankiw, *Macroeconomics*, 9th Edition (Worth Publishers, New York, 2015), pp.123-5.

67 *ibid*, 127.

in Treaty law (the EU's 'constitutional' layer) and can only be changed through the 'Ordinary revision procedure' under Article 48 Treaty on European Union (TEU), which requires, inter alia, unanimity amongst Member States, followed by ratification according to each Member State's constitutional arrangements, which (especially in the current climate) could be an insurmountable hurdle. As regards the substance of ECB independence, not only are the ECB and the NCBs prohibited from taking instructions from EU and national authorities, these authorities are also prevented from 'seek[ing] to influence' the ECB in the pursuit of its tasks. The limits of this phrase are not obvious (does it extend to MEPs criticising the ECB? how is it to be enforced? what sanctions does it carry?),[68] but its intention is clear: political actors are warned not to lean on the ECB. The vague and cautionary nature of Article 130 TFEU is explained by the fact that officials of the ESCB and national governments must and do communicate often in order to coordinate economic and monetary policy. Article 284 TFEU provides a framework for such interactions at a European-level, by permitting the President of the Council of the EU and a member of the Commission to participate in Governing Council meetings, and by allowing the Council to invite the President of the ECB to participate in its meetings. The European Parliament may also request that a member of the Executive Board of the ECB to appear before its committees. Numerous alternative channels also exist, both at a national and European-level, ranging from private meetings to debates on the opinion pages of newspapers. Article 130 TFEU reminds these political actors that the ECB is independent in its decisions and that they must respect this autonomy when advocating a particular policy.

Article 130 TFEU's robustness is also evident from its extension to the NCBs. This is not surprising, given that the Eurosystem functions, to the greatest extent possible, on a decentralised

[68] As van den Berg (n.41) notes: 'de facto we are talking about self-restraint', p.87. The pressurised, interpersonal relations fostered by the Eurocrisis did not always stand up to this exacting standard. For insight to President Sarkozy's fractious relationship with Jean Claude Trichet, see *Financial Times*, 'Saving the Euro: Dinner on the Edge of the Abyss' (10 October 2010), www.ft.com/cms/s/0/190b32ae-d49a-11df-b230-00144feabdc0.html#axzz4Izl8PlNW. See Beukers (n.1) for more colour.

basis (see Section 3.C.i); such decentralisation would be self-defeating if only the ECB was protected by Article 130 TFEU. It is also necessary, to safeguard the NCBs' ability to participate in the design and implementation of a single monetary policy for EMU, rather than only supporting one favoured by their own government.[69]

The degree of independence enjoyed by the ECB raises questions as to its democratic accountability in the formation of monetary policy. From the outset, it was recognised that the ECB is more independent, in both a formal and substantive sense, than the NCBs were historically in their own national legal orders. Comparison is often made with the Bundesbank, generally recognised as the model for the ECB, with commentators observing that the Bundesbank's independence, pre-EMU, was enshrined only in ordinary statute which could be modified by simple majority and that the German government could delay the Bundesbank's decisions for two weeks.[70] A full review of the ECB's democratic accountability is beyond the scope of this paper, which suffices to observe that the ECB's independence is premised on technocratic output legitimacy. The rationale, and faith in expertise, is well-expressed by the German Constitutional Court in its 'Maastricht' judgment: it is 'scientifically proven, that an independent central bank is more likely to protect monetary value, and therefore the general economic basis for national budget policy and private planning and disposition, while maintaining economic liberty, than are sovereign governmental institutions'.[71]

Having introduced the norm of central bank independence in general terms, attention turns to the scope of this norm. In particular, does it apply to the NCBs when they provide ELA as a non-Eurosystem task?

69 The ECB's refusal to release voting records or detailed minutes from Governing Council meetings is similarly justified on the basis of protecting its members from national pressure.
70 Zilioli and Selmayr (n.41), p.33. For a more recent perspective on 'goal' independence, see van der Sluis (n.31).
71 *Re Maastricht Treaty*, BVerfGE 89, 155, 12 October 1993.

Article 130 TFEU does not expressly recognise the distinction between Eurosystem and non-Eurosystem tasks. Instead, it applies when the ECB, the NCBs or any member of their decision-making bodies 'exercis[e] the powers and carry out the tasks and duties conferred on them by the Treaties and [the] Statute'. The tasks conferred by the Treaties and Statute are those set out in Article 127(2) TFEU and Article 3.1 of the Statute, and consequently cannot include non-Eurosystem tasks, which are described by Article 14.4 of the Statute as being 'other than those specified in [the] Statute'.

It is harder to identify the 'duties conferred…by the Treaties and Statutes', as neither source describes the ESCB as having 'duties' or indicates what they are. However, the Statute does deploy 'duties' in relation to the responsibilities of members of the ECB and NCBs' decision-making bodies; for example, in Articles 11 and 14. The inclusion of 'duties' in Article 130 TFEU is therefore intended to ensure the independence of personnel of the ESCB's decision-making bodies when acting in the course of their employment. One wonders whether Article 130 TFEU extends to NCB officials when they perform duties related to non-Eurosystem tasks. This cannot be the case as, once again, Article 130 TFEU is clear that the 'duties' in question are those 'conferred by the Treaties and [the] Statute'. By definition, non-Eurosystem functions are not conferred by EU law; rather, they exist and may be conducted up to the point that they interfere with the tasks and objectives of the Eurosystem. It follows that NCB officials' duties in relation to non-Eurosystem tasks are not conferred by the Treaties.

The scope of Article 130 TFEU is therefore limited to Eurosystem tasks, meaning that the independence of NCBs when providing ELA is not protected.[72] De jure, there is nothing preventing the NCBs from taking instruction from political actors when doing so, nor preventing these actors from seeking to influence the NCBs. On one hand, this is consistent with the functional rationale for independence being to safeguard the pursuit of price stability, rather than

[72] Tupits (n.14) reaches the same conclusion.

a NCB's other activities. On the other, it is surprising, given that governments are likely to have strong preferences that ELA continues to be provided to insolvent institutions, given that the alternative is publicly-funded recapitalisation or disruptive resolution, and may try to control the NCBs accordingly. The ECB seems to have belatedly recognised – and been concerned by – this discrepancy, when advising, in response to an Article 127(4) TFEU consultation in 2008, that a proposed Belgian law regarding ELA be updated to provide that the NCB enjoys 'the same degree of independence' when providing ELA as when performing Eurosystem tasks.[73]

None of the above is to suggest that the NCBs are subservient to governments when providing ELA, only that their independence is not guaranteed by EU law.[74] Article 14.4 of the Statute provides a backstop for these NCBs, however, as the Governing Council can intervene in ELA provision. It may do so if a NCB assumes a government task by supporting an insolvent bank and thereby threatens to breach the prohibition of monetary financing, which is examined next.

ii. *Prohibition of monetary financing*

The destabilising impact of high deficits and debts in a currency union without fiscal union were recognised by the Intergovernmental Conference at which the Maastricht Treaty was designed. In its contributions, the Commission emphasised that these concerns could not be alleviated through multilateral surveillance alone and recommended two additional provisions: first, a prohibition of monetary financing and, second, a no bail-out principle.[75] The former is designed to prevent NCBs from financing their governments, thus restricting these Member States' ability to finance

73 Opinion of the European Central Bank of 8 October 2008 at the request of the Belgian Ministry of Finance on a preliminary draft law on measures promoting financial stability and in particular establishing a State guarantee for the provision of credit in the context of financial stability (CON/2008/46), para.3.3.

74 There is nothing preventing national laws providing such independence, nor national cultures generating an expectation or culture of central bank independence in all areas. For example, following CON/2008/46, Belgian law now does so. See Article Article 9 of Loi portant des mesures visant à promouvoir la stabilité financière et instituant en particulier une garantie d'Etat relative aux crédits octroyés et autres opérations effectuées dans le cadre de la stabilité financière (2008).

75 Commission, 'Intergovernmental Conferences: Contributions by Commission', Supplement 2/91 (1991), p.24.

themselves other than through tax revenues and debt issued to the market.[76] The latter was intended to promote market discipline.

Article 123 TFEU (reiterated in Article 21 of the Statute) codifies the prohibition of monetary financing:

> Overdraft facilities or any other type of credit facility with the [ECB] or with the [NCBs] in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.

On first reading, Article 123 TFEU is surprisingly narrow in its focus on credit facilities and purchases of government debt on the primary market, as there are many ways in which a NCB can finance a government's obligations, without lending directly to the government itself. The wording of Article 123 TFEU is wider than that, however, as it rules out 'credit facilities…*in favour of*' governments, which, on a literal reading, includes any extension of NCB credit which benefits a government by allowing it to avoid an obligation it would otherwise have to meet, whether that credit is provided to a public body or not.

Prima facie, the provision of ELA to insolvent banks is therefore a breach of Article 123 TFEU, as it is a credit facility which defers government-funded recapitalisation.[77] The question is whether Article 123 TFEU extends to non-Eurosystem tasks – which it does. The prohibition of monetary financing aims to encourage sound budgetary policies across the Euro Area. This objective would be jeopardised if the prohibition only extended to Eurosystem tasks, as the core threat of NCBs purchasing their government's debt would remain. Since the CJEU has endorsed a purposive

76 *ibid*, p.54.

77 As explained by the ECB in letters to MEPs. See 'Letter of the ECB President to Matt Carthy MEP Dated 17 February 2015 Re: Your Questions (QZ55-60)' and 'Letter of the ECB President to Sven Giegold MEP Dated 17 June 2015 Re: Your Letter (QZ-78)'. Available on the ECB website.

reading of Article 123 TFEU, the prohibition's overall objective must be borne in mind when determining its scope.[78] Furthermore, Article 123 TFEU is not expressly limited to tasks or duties conferred by the Treaties or Statute, as is Article 130 TFEU, implying that it binds the NCBs in all their functions.

It may be difficult, however, for NCBs to enforce Article 123 TFEU strictly in all their tasks, as doing so could drag them into the kind of political acrimony which central bankers prefer to avoid. In particular, it would be extremely difficult for a NCB to cut ELA in the midst of a crisis, due to the perceived insolvency of the recipient banks, as the government's budgetary position would be plunged into doubt by the demand for recapitalisations and/or the economy would suffer from ensuing bank collapses. A NCB is unlikely to be willing to trigger such an event inside its own national polity.

Given that the NCBs face such conflicts between EMU-norms and their conduct of non-Eurosystem tasks, the Statute provides the ECB with an enforcement role which includes monitoring the NCBs' conduct outside the Eurosystem. Article 35.6 charges the ECB with monitoring the NCBs' compliance with their 'obligations under the Treaties and the Statute' and sets out an enforcement procedure, involving exchanges of opinions before, finally, action at the CJEU. The ECB has confirmed elsewhere that Article 123 TFEU falls under this monitoring role and it monitors NCBs' compliance with the prohibition on an ongoing basis.[79] The Article 35.6 procedure is, however, wholly unsuited to monitoring (and enforcing) compliance with Article 123 TFEU during a banking crisis, because these are volatile situations in which the volume of ELA provided by a NCB or the solvency of the recipient banks can change rapidly.

78 *Peter Gauweiler and others v Deutscher Bundestag*, Case C-62/14, para.101.

79 Decision of the European Central Bank of 20 February 2014 on the prohibition of monetary financing and the remuneration of government deposits by national central banks (ECB/2014/8) (OJ L 159, 28.5.2014, p.54), Preamble.

Instead, the Governing Council has used its power of objection under Article 14.4 of the Statute as a tool to enforce compliance with Article 123 TFEU during the Eurocrisis. For example, the non-public letters from the President of the ECB to the Irish Minister for Finance in 2010 referenced monetary financing concerns as reasons for which ELA might be withdrawn under Article 14.4 of the Statute.[80] Similarly, the ECB warned in 2013 that ELA could only be continued to Cyprus' banks if a programme was in place to ensure their solvency.[81] The ECB's interventions in ELA during the Eurocrisis have therefore been framed in terms of protecting the prohibition of monetary financing.[82] At first glance, this seems strange, as Article 14.4 provides a power of objection only when a NCB's non-Eurosystem functions interfere with the tasks and objectives of the Eurosystem, raising the question of whether Article 123 TFEU falls within its ambit.

I argue that it does and that this connection is crucial to assessing the legality of the ECB's policy of attaching conditions to further ELA provision. The provision of ELA to insolvent banks would breach the prohibition of monetary financing by allowing the government to avoid its responsibilities for recapitalising or resolving failed banks, by relying instead on central bank credit. Following this reasoning, the ECB justifies its interventions in the provision of ELA in Ireland, Cyprus and Greece with reference to ensuring the solvency of the banks to which ELA is provided. In each instance, the ECB states that only the Member State's application for a bail-out will provide reassurance as to its continued solvency, as only then will the government be able to support its banking sector.[83] The Treaties support this logic, in two ways: first, through a functional reading

80 ECB, 'ECB to Irish Minister for Finance (19 November 2010)' (n.45).

81 ECB, 'Liquidity Assistance Requested by the Central Bank of Cyprus' (n.44).

82 The ECB also linked ELA and monetary financing in 2007. See 'Monthly Bulletin, February' (n.44), p.70.

83 Ireland: 'in order to ensure compliance with the prohibition of monetary financing, it is essential to ensure that ELA recipient institutions continue to be solvent […] all these considerations have implications for the assessment of the solvency of the institutions which are currently receiving ELA. It is the position of the Governing Council that it is only if we receive in writing a commitment from the Irish government on the following four points that we can authorise further provisions of ELA to Irish financial institutions'. The four points included Ireland's entry into an EAP and a plan to recapitalise its banks (2010). Cyprus: 'Thereafter, ELA [can] only be considered if an EU/IMF programme is in place that would ensure the solvency of the concerned banks (2013). Greece, less expressly and advocating coordination, rather than an EU/IMF bail-out in particular: 'The Governing Council…welcomed the commitment by ministers from the euro area Member States to take all necessary measures to further improve the resilience of euro area economies' and 'ELA can only be provided against sufficient collateral' (2015). See, respectively, 'ECB to

of the Statute and, second, because monetary financing constitutes an interference with the ESCB's tasks.

The first reason has already been touched upon. Article 35.6 of the Statute tasks the ECB to monitor the NCBs' compliance with their obligations under the Statute. One such obligation is the prohibition of monetary financing. The ECB cannot complete its task of enforcing the prohibition under Article 35.6 alone, as the protracted process fails to account for the fast-changing nature of financial crises. Article 14.4 of the Statute provides, however, a more efficient mechanism to prevent a breach of Article 123 TFEU. The intention of Article 35.6 of the Statute, which tasks the Governing Council to act the 'Guardian of the Statute' can therefore be served by using Article 14.4 to monitor breaches of Article 123 TFEU.

Alongside this purposive reading of the Statute, the ECB's use of Article 14.4 to enforce the prohibition of monetary financing is justified because monetary financing is, in itself, a threat to the objectives and tasks of the Eurosystem.

Article 14.4 of the Statute is both procedurally clear (a two thirds majority) and substantively ambiguous (what does 'interference' mean? how it is determined in relation to a broad task such as monetary policy? what degree of interference is tolerable?). The ECB's statements on why ELA might be withdrawn do not assist in clarifying this ambiguity, as they are tersely loyal to the language of the Treaties. For example, the ELA Procedures simply reiterate that the Governing Council can object to ELA provision by a NCB 'if it considers that these operations interfere with the objectives and tasks of the Eurosystem'.[84] Similarly, in the 2010 letters to Ireland, the ECB simply warns that ELA is considered carefully by the Governing Council 'as it may interfere with

Irish Minister for Finance (19 November 2010)' (n.55); 'Liquidity Assistance Requested by the Central Bank of Cyprus' (n.44); 'ELA to Greek Banks Maintained at Its Current Level' (28 June 2015), www.ecb.europa.eu/press/pr/date/2015/html/pr150628.en.html; 'ELA to Greek Banks Maintained' (6 July 2015), www.ecb.europa.eu/press/pr/date/2015/html/pr150706.en.html. See Section 4 for discussion.

84 ELA Procedures (n.51).

the objectives and tasks of the Eurosystem'.[85] To date, the ECB has therefore not explained how or why ELA provision by a NCB might interfere with its tasks and objectives (i.e. its definition and implementation of a single monetary policy and the maintenance of price stability), perhaps due to the difficulty of doing so in a comprehensive or determinative manner. As Thiele notes, central banking cannot be reduced to an *if x, then y* scheme at the best of times, let alone in relation to ELA and crisis management.[86] The ECB may also be preserving as much 'constructive ambiguity' as possible in order to mitigate moral hazard and retain flexibility for future crises. That said, the failure to explain how or why ELA provision might interfere with the ECB's pursuit of a single monetary policy is remiss; such guidelines need not unduly restrict the ECB's future response to unforeseen or novel circumstances and they would provide greater clarity regarding decisions under Article 14.4. Instead, the ECB simply states that the 'integrity' of the single monetary policy must be protected, which is not very transparent.[87]

These are very real concerns, given the scale of the interventions in ELA which have been premised, at least in part, on defending the tasks and objectives of the Eurosystem. Nor has the ECB divulged how monetary financing interferes with its conduct of a single monetary policy. This is surprising, given that its potential to do so can more readily be explained. For example, the ECB's implementation of a single monetary policy would be impeded by monetary financing if it led to volatile rates of inflation in certain Member States, due to the Eurosystem losing its position as the primary determiner of the monetary base. Monetary financing could also lead to further destabilisation of the banking system, if the value of a government's bonds are depressed by a NCB supporting the mass issuance of more debt. The ECB's ability to steer rates is impeded by a

[85] 'ECB to Irish Minister for Finance (19 November 2010)' (n.45).

[86] Alexander Thiele, *Das Mandat der EZB und die Krise des Euro* (Mohr Siebeck, 2013).

[87] See, for examples, 'ECB to Irish Minister for Finance (19 November 2010)' (n.45); 'ECB to Matt Carthy MEP (17 February 2015)' (n.77). The manner in which ELA provision might threaten the ECB's ability to implement a single monetary policy surely includes the risk to price stability if NCBs issue too much additional liquidity or the risk of a NCB suffering such losses that they are left unable to participate in Eurosystem monetary policy operations. On the former, see Grauwe (n.6). In any event, given that the consequences of a removal of ELA would likely be a Member State's exit from the single currency, one wonders whether that would not be more disruptive to the single monetary policy.

panicking, weak or frozen banking system. For these reasons, Article 123 TFEU is crucial to the Eurosystem's ability to carry out its tasks and objectives.

The Governing Council's application of Article 123 TFEU to ELA during the Eurocrisis has not, however, simply been that of strict and dogmatic enforcer. As will be discussed, ELA was deployed during the banking crisis to support entire national banking systems for significant periods of time – a striking development from the ECB's public statements that ELA provides only temporary relief. The mobilisation of ELA on such a scale might be interpreted as a credit facility very much 'in favour of' governments, especially since the solvency of many recipient banks was doubtful.[88] Nevertheless, the ECB accommodated such high and prolonged levels of ELA provision into its doctrine of ELA oversight, by suggesting that a breach of Article 123 TFEU would be averted if the Member States in question were to enter an EAP securing the government (and therefore the banking sector)'s long-term solvency. The prohibition of monetary financing was thus operationalised to convince recalcitrant Member States to enter bail-outs premised on rapid fiscal consolidation – they otherwise risked a Governing Council objection to ELA provision, with unknown consequences. It is this reasoning which supports the ECB's interventions in specific Member States regarding ELA and which explains how Article 123 TFEU enables, in theory, interventions premised on conditionality. Nevertheless, the nature of the conditions attached to ELA in practice by the ECB and its express support for particular types of economic reform raise the question of whether the ECB's mandate permits it to exert influence across such a range of policy fields which are normally determined by democratic contest. A legal justification for intervention in ELA and conditionality must adhere to the limits on ECB action set out elsewhere in the Treaties.

Attention turns, therefore, to ELA-in-action. The following section provides background on the ECB's actual interventions during the Eurocrisis and evaluates them in light of the analysis so far.

88 See, in particular, Cyprus and the example of Laiki Bank.

4. ELA interventions during the Eurocrisis

This section has two aims. First, it locates ELA in the context of the Eurocrisis as an unfolding series of financial, economic, political and legal ruptures and choices by describing the provision of ELA in four countries. It demonstrates how the ECB's oversight of ELA has developed through ad hoc interventions in the face of unprecedented crises and through iterative engagements with a messy reality, rather than through careful planning. Second, it evaluates the ECB's interventions in these countries against the legal justification for intervention set out in the paper so far, in order to assess the ECB's interventions in practice. Space and time constraints do not allow for an exhaustive evaluation, which would require, for example, detailed analysis of the solvency of recipient banks and of the terms attached the bail-outs. Instead, a broad comparative approach is adopted by considering each intervention in terms of its timing, form and specificity regarding conditionality.

A. Belgium

ELA was called for in the Euro Area from the start of the global financial crisis. On 15 September 2008, Lehman Brothers concluded its protracted death-spiral and filed for bankruptcy, exposing the weakness of the global banking system. Belgian financial institutions faced immediate difficulties; in 2008 alone, Fortis, Dexia, KBC and Ethias were recapitalised with EUR 21.7bn of public funds.[89] The provision of ELA to Fortis and Dexia is described below, as instances of classical LOLR action.

In October 2007, Fortis had participated, alongside Royal Bank of Scotland and Santander, in the acquisition of parts of ABN Amro, a Dutch banking group. The acquisition reduced Fortis' financial flexibility as the Commission made its approval, from a competition perspective, conditional on Fortis' divestment of parts of the ABN Amro business. As markets worsened

[89] NBB, 'Annual Report, 2008', Part I: Economic and Financial Developments, p.148.

through May and June 2008, Fortis faced losses through these forced sales and brought forward its capital consolidation. An anticipated dividend of EUR 1.3bn in 2008 was not paid and further capital instruments were issued, prompting Fortis' share price to fall. Its exposure to structured financial instruments, which were being recognised as sources of vulnerability, encouraged further adverse speculation.[90] Fortis was eventually recapitalised with EUR 10.7bn on 29 September 2008 by the Belgian, Dutch and Luxembourg governments, with each contributing state taking a 49 percent share of Fortis' operations in their respective countries.[91]

Following the collapse of Lehman Brothers, the interbank and wholesale markets were reluctant to refinance Fortis. Professional counterparties withdrew their deposits, thus creating a liquidity crunch. The National Bank of Belgium (NBB) provided ELA from 29 September 2008, which peaked at EUR 51.3bn on 3 October.[92] To reassure the NBB as to potential losses, the Belgian government issued a decree dated 15 October 2008 which, *inter alia*, provided a retroactive government guarantee for emergency funding from the NBB from 28 September 2008.[93]

The provision of ELA to Fortis was consistent with traditional understandings of LOLR action. Emergency liquidity at high volumes was short-lived, as can be ascertained from the NBB's monthly accounts. 'Other claims on euro area credit institutions denominated in euros' (the item under which ELA was then listed by the NBB and under which is it now listed by all Eurosystem NCBs)[94] rose from EUR c.1.2bn at the end-of-September to c20.5bn at the end-of-October, but

90 *ibid*, pp.177-8.

91 For an overview of government bail-outs and guarantees in Belgium, see Mayer Brown LLP, 'Summary of Government Interventions: Belgium' (April 2009).

92 NBB (n.89).

93 Loi de 15 Octobre 2008 portant des mesures visant à promouvoir la stabilité financière et instituant en particulier une garantie d'Etat relative aux crédits octroyés et autres opérations effectuées dans le cadre de la stabilité financière, Art. 8 and 15. A state guarantee for ELA is now recognised by the Commission as necessary to prevent ELA becoming State Aid. For discussion of the nexus between ELA and State Aid, see Georgios Psaroudakis, 'State Aids, Central Banks and the Financial Crisis', *European Company and Financial Law Review*, 194-220.

94 See Annex I, Item 6 of the Guideline of the European Central Bank of 10 December 2012 amending Guideline ECB/2010/20 on the legal framework for accounting and financial reporting in the European System of Central Banks (ECB/2012/29) (OJ L 356, 22.12.2012, p.94). Prior to this harmonisation, NCBs accounted for ELA under 'Other claims on credit institutions denominated in euros' (i.e. Belgium) or under 'Other assets' (i.e. Ireland).

peaked at over c.50bn in early October.[95] The worst of the Belgian banking system's illiquidity was therefore temporary and the recapitalisation and restructuring of struggling banks such as Fortis helped to restore confidence. ELA was provided against non-standard collateral which did not qualify for Eurosystem operations, reportedly including the buildings of Fortis' retail banks.[96] It was also provided at penalty rates.[97] The typical elements of ELA were therefore present as the NBB and the Belgian government grappled with Fortis' weaknesses.[98]

Dexia was exposed to the financial crisis through a subsidiary in the USA which sold insurance for securitised assets and structured financial assets, such as collateralised debt obligations. Although this subsidiary was not heavily exposed to the riskiest securities, Dexia was forced to provide EUR 300m for its recapitalisation, alongside a USD 5bn credit line. The dislocation of the wholesale and interbank markets following the collapse of Lehmann created further problems for Dexia, which relied on these sources of financing. Counterparties' concerns regarding Dexia's exposures in the USA were therefore exacerbated. Dexia received EUR 6.4bn in recapitalisation from the Belgian, French and Luxembourg governments and existing shareholders. Although the NBB's Annual Report for 2008 does not expressly confirm that Dexia received ELA,[99] a later Commission review of Dexia's subsequent restructuring does, though the amount is not stated.[100]

In 2011, Dexia's exposure to sovereign bonds and its reliance on wholesale and interbank markets led to its restructuring, with the Belgian state purchasing parts of its business. The monthly financial statements of the NBB indicate that 'Other claims on euro area credit institutions

95 NBB, 'Monthly Financial Statement of the National Bank of Belgium', available on the NBB website and filtered to show the relevant months.

96 Warren Mosler, 'Emergency Liquidity Assistance in the Euro Area' (3 December 2008), www.moslereconomics.com/2008/12/03/re-emergency-liquidity-assistance-in-the-euro-area/.

97 NBB (n.89), p.178.

98 Which is not to imply that everything ran smoothly. For an account of the often acrimonious negotiations between the Belgian, Dutch and Luxembourg authorities, see *La Libra*, 'Chapitre 7: La Trahison des Hollandais' (1 December 2008), www.lalibre.be/economie/libre-entreprise/chapitre-7-la-trahison-des-hollandais-51b7313fe4b0de6db9752d3c.

99 See NBB (n.89), p.179, which ambiguously states: 'here, too, the authorities had to intervene'.

100 Commission, 'Competition Policy Newsletter', Number 2 (2010), p.64.

denominated in euros' increased from EUR c.2bn to c.23bn from September to November 2011, reducing to c.9bn in December.[101] The bulk of this increase was ELA to Dexia.[102] As with Fortis in 2008, ELA was quickly reduced, provided against non-standard collateral and at high rates. The State guarantee protected the NBB from loss and, because it was credible, eased concerns regarding monetary financing.

Belgium offers an example of ELA in the context of an economically strong nation, which found its over-extended banking sector exposed to temporary illiquidity and market panic. The national legal framework required ad hoc revision (as instanced by the decree dated 15 October 2008) but the state guarantee for ELA allayed concerns as regards Article 123 TFEU and the NBB's exposure to loss. ELA was provided alongside (rather than instead of) state recapitalisation and restructuring, thus addressing both the illiquidity and insolvency of the troubled banks. Similar examples can be found in Germany,[103] the UK and Sweden.[104]

In contrast, the next three case studies demonstrate how ELA provision developed in Member States where weaknesses in the banking system became locked into a mutually deleterious 'doom loop' with the sovereign's credibility and where the ECB intervened to try and break that link.

B. Ireland

Ireland's economy accelerated rapidly from 1990 to the mid-2000s, as GDP more than tripled.[105] The 'Celtic Tiger' was celebrated as the only Western nation rivalling the growth of the East Asian

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101 NBB, 'Monthly Financial Statement of the National Bank of Belgium', available on the NBB website and filtered to show M9 2011 - M12 2011.

102 Dexia, 'Annual Report 2011', p.78: 'the amount of emergency liquidity assistance was EUR 18.7 billion'. Some reports place overall levels of ELA provided to Dexia at EUR 30-40bn, once the Banque de France and the Banque Centrale du Luxembourg's contributions are included; see *Reuters*, 'France, Belgium Seek Temporary Deal on Dexia-Paper' (23 November 2011), www.uk.reuters.com/article/dexia-guarantees-idUKL5E7MN0A620111123.

103 See Claus Vistesen, 'Emergency Liquidity Assistance in the Eurozone - Draghi's Irreversible Euro Put Explained' (9 August 2012), www.creditwritedowns.com/2012/08/emergency-liquidity-assistance-in-the-eurozone-draghis-irreversible-euro-put-explained.html.

104 See *Independent*, 'We Are Not First to Use Emergency Liquidity Assistance to Dig out Lenders' (10 February 2011), http://www.independent.ie/business/irish/we-are-not-first-to-use-emergency-liquidity-assistance-to-dig-out-lenders-26676742.html.

105 OECD, www.data.oecd.org/gdp/gross-domestic-product-gdp.htm (adjusted to show figures for 1990-2006).

economies.[106] However, the foundations of the boom gradually changed from export-led growth and foreign-direct investment to 'a domestic boom underpinned by lax lending'.[107] Ireland's banks expanded into overseas and non-retail markets from the early-2000s and the Irish state sought to facilitate the financial sector's growth; for example, by creating the International Financial Services Centre, an area of Dublin exempt from normal taxation laws, and by encouraging light-touch regulation.[108] A ready supply of cheap money followed the introduction of the euro, leading to the Irish population investing a high proportion of national and personal wealth in property.[109] In the first eight years of the euro, Irish house prices increased 155 percent.[110] To fund their lending, Irish banks turned to USA and European wholesale markets, 'essentially borrowing overnight to fund thirty-year mortgages'.[111] The assets of the three main Irish banks rose to c.400 percent of GDP by end-2007, with Anglo Irish Bank (Anglo) particularly exposed to short-term funding.[112]

Worsening conditions through 2008 therefore placed great pressure on the Irish banking sector.[113] When the interbank markets froze following the collapse of Lehman Brothers, Irish banks were unable to service their loans and domestic and international property prices fell, leaving the system facing implosion. The government stepped in on 30 September 2008 with a near-blanket guarantee of the banking sector's liabilities for the next two years.[114] This controversial decision sought to prevent the private debt bubble from bursting by making it a contingent liability of the public purse.[115] The extent of coordination between the Irish government and its European partners before the Guarantee is not clear: the Minister for Finance reported that the President of the ECB

106 *The Economist*, 'The Luck of the Irish' (14 October 2004), www.economist.com/node/3261071.
107 IMF, 'Article IV Report: Ireland', Country Report No. 12/264 (2012), p.4.
108 Houses of the Oireachtas, 'Report of the Joint Committee of Inquiry into the Banking Crisis', Vol. 1 (2016), p.25-6.
109 *ibid*, pp.20-4.
110 Sandbu (n.16), p.83.
111 Blyth (n.18), p.65.
112 *ibid*, pp.65-6.
113 Oireachtas (n.108), pp.204-27.
114 Which received legislative form on 2 October 2008, as the Credit Institutions (Financial Support) Act 2008.
115 Commission, 'Ex Post Evaluation of the Economic Adjustments Programme: Ireland, 2010-2013', Institutional Paper 004 (July 2015), p.23: 'the solvency of the Irish sovereign and that of the banking system became directly intertwined'.

warned him to 'save the banks at all costs',[116] but this is denied by Jean Claude Trichet, who argues that all governments were already committed to preventing another Lehman Brothers-esque collapse.[117] Further, an ECB opinion on the legislation enshrining the Guarantee expresses concern at unilateral action, given the need for Euro Area governments to work together (the subtext being that other governments may feel compelled to follow suit if the Guarantee encouraged investors to prefer Irish banks).[118] Either way, the Guarantee would set the context for the conditions which eventually forced Ireland to accept a bail-out, a decision in which the ECB was heavily involved.

No express statement as to the solvency of the banks was made at the time of the Guarantee, despite the financial regulator (reportedly) requesting one, leading to allegations that the government was attempting 'the most expensive bluff in Irish political history'.[119] As Sandbu observes in retrospect, a guarantee can be justified to tide banks over small losses and temporary investor-panic, but not if there are doubts over the banks' long-term ability to honour their debts.[120] Indeed, having put the taxpayer on the hook for a potential EUR 440bn of outstanding bank debt, the government committed ever-increasing sums to recapitalising Irish banks through 2009 and 2010.[121] It also established the National Asset Management Agency (NAMA) as a 'bad bank' onto which lenders could off-load non-performing property loans at a significant discount.

At the time of the Guarantee, one argument against clarifying the solvency of Irish banks was the expectation that Anglo would be taken into public ownership on the following weekend.[122] Anglo's

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116 As recounted in the documentary by RTÉ, *Freefall*, Programme 1.

117 Jean Claude Trichet, Response to Questions from the Joint Committee of Inquiry into the Banking Crisis, www.inquiries.oireachtas.ie/banking/hearings/jean-claude-trichet-iiea-event-not-an-official-inquiry-hearing/#para_1128, at 1128.

118 Opinion of the European Central Bank of 15 October 2008 at the request of the Irish Minister for Finance on a draft Credit Institutions (Financial Support) Scheme 2008 (CON/2008/48), para.2.

119 Oireachtas (n.108), pp.268 and 261.

120 Sandbu (n.16), p.93.

121 For an overview, see *Daily Telegraph*, 'Ireland's Banking Crisis: Timeline' (31 March 2011), www.telegraph.co.uk/finance/financialcrisis/8419616/Irelands-banking-crisis-timeline.html. Judging by their eventual losses, some Irish banks were insolvent many times over; see Colm McCarthy, 'Improving the Eurosystem for Old and New Members', UCD Centre for Economic Research, WP 12/03, p.5.

122 Oireachtas (n.108), p.172.

monoline business model was very exposed to the property and wholesale markets. When the former fell and the latter froze in late 2008, it was badly affected. The timing of the Guarantee was motivated, in part at least, to ensure Anglo could open for business on 30 September 2008 without being reliant on ELA, which, it was feared, would have negative contagion effects for the entire system.[123] The Minister for Finance boasted that the Guarantee was 'the cheapest bailout in the world' as it provided investors with the confidence to maintain liquidity to Ireland's banks.[124] That is not to suggest ELA was not utilised at this point: the Central Bank of Ireland's (CBI) monthly balance sheet indicates that 'Other Assets'[125] rose from a pre-crisis average of EUR c.3bn to c.7.5bn in the final three months of 2008 (though this was lower than the c.12bn recorded in late 2007)[126] and a letter of comfort from the governments to the CBI was prepared on 30 October to guarantee any ELA for Anglo.[127] However, the Guarantee meant that only minimal amounts of ELA were required.

Relief was only temporary, however. In January 2009, the government nationalised Anglo as conditions continued to worsen. The CBI's accounts show that 'Other assets' jumped from EUR c.1.5bn to c.11.5bn between February and March 2009,[128] most of which was ELA to Anglo.[129] From early 2009 to mid-2010, ELA hovered at EUR c.11-15bn.[130] By late 2010 the Guarantee was due to expire and the Irish banks faced renewed pressure.[131] The 'funding cliff' is apparent in the rapid increase of ELA from the end of 2010, from EUR c.14bn in August to c.50bn by December.[132] Analysis by Citibank indicates that ELA helped to offset the withdrawal of EUR

123 *ibid*, p.259.
124 *Irish Times*, 'Irish Bailout Cheapest in World, Says Lenihan' (24 October 2008), www.irishtimes.com/business/irish-bailout-cheapest-in-world-says-lenihan-1.900393.
125 Which, for the CBI, included ELA until 2012. See n.94 for current practice.
126 CBI, Financial Statement of the Central Bank of Ireland, Table A.2, www.centralbank.ie/polstats/stats/cmab/pages/money%20and%20banking.aspx.
127 Oireachtas (n.108), p.259.
128 CBI (n.126).
129 Anglo Irish Bank, 'Annual Report, 2009', p.102.
130 CBI (n.126).
131 Barry Eichengreen, 'The Irish Crisis and the EU from a Distance', IMF Paper (January 2015), p.6.
132 CBI (n.126). In 2016, a freedom of information request by RTÉ revealed that the Minister for Finance provided letters of comfort to the CBI guaranteeing ELA provided to various Irish banks at this time; see RTÉ, 'Irish

c.120bn of private deposits from Irish lending institutions.[133] In addition, the banks covered by the guarantee took advantage of it by issuing EUR c.61bn of bonds between October 2008 and May 2010, with an average maturity of 30 months,[134] creating a pronounced re-financing need on the expiry of the Guarantee. A further contributory factor was that the Guarantee removed incentives for bank restructuring, since liquidation or closure would have triggered the government's liability, meaning that the banks' balance sheets remained fundamentally weak.[135] These pressures were not unforeseen, however. In early 2010, the CBI warned that the covered institutions required EUR c.10.9bn in additional capital to restore their credibility; a figure which grew as NAMA continued its excavations of the banks' bad loans.[136]

The result was that, in late 2010, weaknesses in the banking sector converged with the sovereign's increasingly precarious position. As described in Section 2.A, the interdependence of the banking system and the economy in Europe creates a strong incentive for the state to backstop its banks. If the state's credibility is in question, the adequacy of that backstop is in doubt. Likewise, a failing banking sector can lead to expectations of a state-funded bail-out, meaning that sovereign debt markets price-in that government's worsened fiscal position and demand more yield from its debt. This mutually reinforcing dynamic is evident in Ireland: although it had entered the financial crisis with government debt at just 25 percent of GDP, a mid-2010 report forecast that it would rise to 95 percent by the end of the year, mainly due to the EUR c.31bn so far used to recapitalise the banks.[137] Furthermore, between 2007 and 2011, the share of Irish debt held by domestic banks increased from 0.8 to 15 percent,[138] by no means the highest in the Euro Area but significant in its

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Banks' Emergency Funds Revealed in Documents' (10 May 2016), www.rte.ie/news/special-reports/2011/0718/303839-banksfeature/.

133 Willem Buiter et al, 'ELA: An Emperor without Clothes?', Citibank, Global Economics View (January 2011), Fig. 1.

134 Aviram Levy and Sebastian Schich, 'The Design of Government Guarantees for Bank Bonds', *OECD Journal: Financial Market Trends*, 35(1) (2010), 36-66, at: 45.

135 Oireachtas (n.108), p.281.

136 *ibid*, p.334.

137 Irish Government, National Recovery Plan: 2011-2014 (2010), p.16.

138 Silvia Merler and Jean Pisani-Ferry, 'Hazardous Tango: Sovereign-Bank Interdependence and Financial Stability in the Euro Area', Banque de France, Financial Stability Review 16 (2012), 201-210, at: 207.

context as it indicates that Irish banks invested disproportionately (relative to historic behaviour) in their sovereign's new debt. This development created fears of a so-called 'doom loop' in which the solvency of the banks and the sovereign become even more inseparable. In September 2010, with the 'funding cliff' looming, the economy showing no sign of recovery and sovereign yields touching 7 percent, the government announced its withdrawal from the bond markets for a temporary period. International developments had also not helped the Irish government: the 'Deauville Declaration' of 18 October 2010, in which Chancellor Merkel and President Sarkozy announced that holders of Euro Area sovereign debt should accept losses as part of any debt restructuring increased sovereign yields by flagging a new risk for investors.

Seeking to reassure the market, the Irish government had committed to fiscal consolidation, economic reforms and repairing the banking sector from 2009.[139] It was due to announce a four-year economic reform plan in November 2010. However, in worsening circumstances, ELA from the CBI rose to EUR c44bn by the end of November.[140] On 15 October 2010, the President of the ECB wrote to the Minister for Finance (Brian Lenihan) to express concern at both the volume of liquidity being drawn by Irish banks from the Eurosystem and the volume of ELA extended by the CBI. As regards the latter, Trichet reminded the Minister that ELA is not available to insolvent institutions (on account of the prohibition of monetary financing) and warned that the ECB may impose 'specific conditions' to address its concerns. The letter concludes by reminding the Minister that neither Eurosystem liquidity nor ELA should be regarded as a long-term solution and that the ECB will review Ireland's progress in implementing a 'four-year economic strategy' when deciding on future liquidity provision in Ireland.[141] Lenihan's reply reiterated Ireland's commitment to long-

[139] For discussion of how the Ireland bail-out built on the government's commitments, see Stephen Coutts, 'Chapter on Ireland', in *Eurocrisis Law and National Constitutional Change*, eds. Thomas Beukers, Bruno de Witte and Claire Kilpartrick (CUP, Forthcoming).

[140] CBI (n.126).

[141] ECB, 'ECB to the Irish Minister for Finance' (n.45).

term economic reform and noted the adverse impact on Irish bond yields of comments from senior, European-level political figures.[142]

On 19 November 2010, Lenihan received another letter from Trichet, warning that the Governing Council would object to continued ELA-provision in Ireland unless the government formally requested a bail-out. The letter explained that the ECB must consider whether 'it is appropriate to impose specific conditions' on ELA, in order to protect the integrity of the single monetary policy or to guard against monetary financing. On 28 November 2010, the Irish government duly concluded a three-year financial assistance package with the Commission, the ECB and the IMF, on the condition of rapid fiscal consolidation. Intervention from the ECB, through the gateway of its oversight of ELA provision, was thus the immediate trigger for Ireland's entry into an EAP.

i. *Evaluation*

Three points will be made in evaluating the legality of this intervention. First, the solvency of the Irish banking sector and the capability of the government to recapitalise it were very much in doubt. The banks had been reliant on ELA for a long period of time and their loan portfolios were not performing amidst a domestic recession and falling house prices. The government itself could not access the bond markets and its guarantee for ELA (in the form of letters of comfort)[143] was not credible. Prima facie, there does appear to have been a serious risk of a breach of the prohibition of monetary financing as the CBI was assuming a government task by keeping the banking sector afloat through ELA, but without any indication that the government was capable of resuming its responsibilities for recapitalising or restructuring the banks.

142 Brian Lenihan, 'Reply Letter of Irish Minister for Finance Dated 04/11/2010' (4 November 2010), www.ecb.europa.eu/press/shared/pdf/2010-11-04%20-%20Letter_IE_FinMin_to_ECB_President.pdf?92646d18e42fa6c721ec6fccf42e1ac4.

143 See n.132.

In a recent speech, Peter Praet, a member of the ECB's Executive Board, describes two innovations in the scope of ELA.[144] He describes how ELA was provided during the Eurocrisis for longer durations than normal and on such a scale that it was targeted at entire national banking systems, rather than at individual illiquid banks. According to Praet, it is the scale of ELA provision which justifies ECB intervention in order to protect Article 123 TFEU. Recognising that certain governments could not meet their present obligations, the ECB's attention switched to ensuring the long-term sustainability of these government's budgets. The provision of ELA to entire banking systems also required the ECB to adopt a pragmatic approach to policing Article 123 TFEU. Banking crises can hit suddenly and ELA can spike in a short period of time. In contrast, a government's progress to the point where an EAP is on the table may be long and tortuous. According to Praet, the ECB therefore refrained from a strict application of Article 123 TFEU until the outlook was no longer favourable for a positive outcome from negotiations between the Member State in question and its putative creditors. Only at this point did the ECB exercise its right of intervention.

The second point to note as regards the Ireland letters of October and November 2010 is that they remained non-public until November 2014, when they were finally released following several requests from the European Ombudsman. Both the form of the ECB's intervention and its unwillingness to release the letters are concerning. The use of non-public letters to trigger a decision of such magnitude for domestic politics does not, according to the European Ombudsman, respect the 'principles of transparency and accountability'.[145] Such disregard is not conducive to encouraging trust in European governance.[146] Furthermore, although ECB intervention in ELA provision on grounds of monetary financing might be lawful in theory, such

144 ECB, 'The ECB and its Role as Lender of Last Resort during the Crisis', Speech by Peter Praet (2016), www.ecb.europa.eu/press/key/date/2016/html/sp160210.en.html.

145 European Ombudsman, 'Decision of the European Ombudsman closing the inquiry into complaint 1703/2012(VIK)CK against the European Central Bank' (24 April 2014), http://www.ombudsman.europa.eu/en/cases/decision.faces/en/54178/html.bookmark.

146 On the ECB's transparency more broadly, see Deirdre Curtin, 'Working Title: Seeing the ECB' (forthcoming).

interventions should flow from a prospective framework through prescribed sources. Non-public letters articulating a novel, fledgling doctrine clearly do not meet this standard. The abnormality of this (non-)legal source denies citizens foresight of which powers lie with which institutions and abrogates these citizens' ability to challenge such actions in the courts, both because the instruments in question are not made public and because the courts are ill-suited to assessing abnormal sources. The ECB's intervention in Ireland is therefore difficult to square with the formal requirements of the rule of law, such as a prospective, formal legal framework premised on transparency.[147]

Finally, in the letter of November 2010, the President of the ECB listed four conditions to which the Irish government must agree in order for ELA to continue. The first condition was a request for a bail-out. The second was that the request 'shall include the commitment to undertake decisive actions in the areas of fiscal consolidation, structural reforms and financial sector restructuring'. The ECB here directs a Member State's economic policy, whereas – according to Article 127 TFEU – it is only responsible for supporting the Member States' economic policies. The order and phrasing of the ECB's conditions are telling on this point. The ECB requires that the Irish request for a bail-out contains a commitment to centre-right economic reforms, rather than requiring the government to request a bail-out to ensure its long-term viability, but allowing negotiations between Ireland and its creditors to determine what reforms will best provide this. That Ireland needed financial assistance is not in doubt, but what kind of economic reforms it should have pursued is certainly arguable, with views on the left and right differing sharply. The ECB's letter does not acknowledge the politicised nature of this question as it does not allow for debate and decision amongst the political representatives of the creditors and debtor. As such, it transforms its legal basis for intervening in ELA into an opportunity to exert greater influence than it is permitted by the Treaties, which is deeply problematic from the perspectives of

[147] See Martin Krygier, 'Rule of Law', *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier 2001).

democratic accountability for economic policy – and for the ECB's legitimacy as an independent institution which operates within defined limits. That the Irish government had already been pursuing austerity-oriented policies in the months preceding the bail-out, upon which the post-bail-out reforms largely built, does not change this conclusion.[148] Nor does the fact that the result would almost certainly have been the same, had the ECB been less forthright as regards its preferred economic reforms, given that the political representatives of EMU had already signalled their commitment to fiscal consolidation. The conclusion is also unaffected by the ECB's involvement, through the Troika, in negotiating the conditions attached to bail-outs, as the Troika should also be subject to the political direction of travel in the Member States; broadly speaking, in the event that there was sufficient political will to address the crisis differently, the EU institutions should accommodate those preferences. The conditionality of the Irish intervention is therefore not mindful of the division of responsibilities in the Treaties. It demonstrates the real risk that the legal basis for ELA intervention can be operationalised to facilitate interventions in favour of particular political and economic outcomes, despite these lying outside the ECB's control.

C. Cyprus

Cyprus entered the EU in 2004 and adopted the euro in 2008. It recorded average annual GDP growth of 4.5 percent between 1980 and 2010,[149] but EU membership allowed latent destabilising trends in the banking system to flourish. For example, strict interest rate regulation, in force until 2001, had reduced incentives for banks to lend to long-term or riskier projects.[150] A pattern of underinvestment in productivity-enhancing infrastructure consequently emerged: in the 1980s, the fraction of total investment going to machinery and equipment in Cyprus was half that of OECD

148 See Coutts (n.139).
149 Alexander Michaelides, 'Cyprus: From Boom to Bail-In', *Economic Policy*, 29 (2014), 639-89, 646.
150 Sofronis Clerides, 'The Collapse of the Cypriot Banking System: A Bird's Eye View', *Cyprus Economic Policy Review*, 8(2) (2014), 3-35, 5-6 and 9.

countries.[151] In addition, national rules permitted lenders to not classify loans which were adequately collateralised as 'non-performing', meaning that banks were incentivised to lend to sectors where collateral was readily available (because, in the event of the borrower falling into arrears, the crystallisation of losses could be deferred). A pattern of overinvestment in real estate and construction projects duly followed.[152]

Cyprus' entry to the EU attracted foreign banks to open branches in Cyprus. Since the lifting of interest rate regulation, Cypriot banks had engaged in a 'price war' to offer the best rates to depositors and the presence of international banks intensified the competition. Deposit rates reached 5 to 6 percent in the mid-2000s, several points higher than those offered in other Euro Area countries.[153] Attractive rates also appealed to international savers and the proportion of non-residents' deposits in Cypriot savings accounts increased from c.25 to c.50 percent from 2004 to 2007, with overall deposits increasing from EUR c.20bn to c.40bn over the same period.[154] High deposit rates required banks to generate significant profits, however. Banks therefore continued to both fuel and milk the property bubble (residential property prices increased by c.240 percent between 2002 and 2008).[155] Cypriot banks also expanded overseas, particularly into Greece and the Balkans.

Cyprus' public finances seemed healthy in the mid-2000s, as its debt to GDP ratio in 2008 was c.48 percent.[156] However, this masked several less stable factors. First, successive governments had run persistent and increasing deficits, placing debt to GDP ratio on an upwards trajectory even before presidential elections in 2008 resulted in a communist-led government with a mandate to increase social spending.[157] Second, government revenue was dependent on capital gains tax, which

151 *ibid*, 10.
152 *ibid*, 25.
153 *ibid*, 23.
154 Central Bank of Cyprus, cited in *ibid*, 15.
155 *ibid*, 16.
156 Public Debt Management Office, cited in Michaelides (n.149), 645.
157 For a scathing review of the 2008-2013 government, see Athanasios Orphanides, 'What Happened in Cyprus? The Economic Consequences of the Last Communist Government in Europe', MIT Sloan School Working

was mainly generated by real estate transactions.[158] The fiscal position was therefore vulnerable to slow-down in this sector. In addition, the banking sector's large contribution to tax revenues encouraged the government to adopt a permissive attitude to financial standards.[159] Third, Cyprus' banking sector was vast relative to its economy. In 2007, the total assets of Cypriot banks was c.700 percent of the country's GDP.[160] As Stephanou notes, while other Euro Area countries also host oversized domestic and international banks, Cyprus had two domestic banks with assets (relative to GDP) equivalent to the entire domestic banking system of most other countries.[161] Finally, Cyprus had become significantly less competitive since 2000, with wage-growth not being matched by increases in productivity.[162] Given these factors, Cyprus' public finances at the advent of the crisis look less resilient.

Cyprus was pushed into recession by the financial crisis following the collapse of Lehmann Brothers. The real estate sector was, and remains, badly affected: as of August 2014, c.72 percent of loans to the construction sector were non-performing.[163] Concerns about weaknesses in the banking sector and the government's fiscal policy (it increased 'non-productive' spending despite a dip in tax revenues)[164] led to a series of downgrades of Cypriot government debt. Following parliamentary elections in May 2011, the three main credit rating agencies downgraded Cypriot debt to such a low status that the government could not access international capital markets. An explosion near the country's largest power station in June 2011 further worsened perceptions of Cypriot debt sustainability. The resultant pressure of Cyprus' banks is (again) evident in the steady

Paper No. 5089-14 (2014). The paper should be read in light of Orphanides' rancorous relationship with this government while serving as Governor of the Central Bank of Cyprus during the same period.

158 Clerides (n.150), 19.

159 Independent Commission on the Future of the Cyprus Banking Sector, 'Final Report and Recommendations' (2013), p.25.

160 *ibid*, p.21.

161 Constantinos Stephanou, 'The Banking System in Cyprus: Time to Rethink the Business Model?', *Cyprus Economic Policy Review*, 5(2) (2011), 123-30.

162 International Labour Organisation, 'Global Wage Report, 2012/13', p.14.

163 Clerides (n.150), 23.

164 See Michaelides (n.149), 646-7.

rise of ELA issued by the Central Bank of Cyprus (CBoC). At the end of 2011, the Cypriot banking sector had borrowed EUR c.3.5bn of ELA, up from c.0.6bn at the end of 2010.[165]

Michaelides' analysis of credit default swap sovereign spreads indicates that Cyprus should have applied for an EAP in the summer of 2011. He argues that the government's refusal to apply to the nascent European rescue mechanisms raised the costs of the eventual bail-out.[166] Instead, the Cypriot government arranged an emergency loan of EUR 2.5bn from Russia in December 2011, which was intended to finance the government for the remainder of its term. However, the second Greek EAP was concluded over the same months and included a bail-in of private sector creditors holding Greek debt (see Section 4.D.i). When the bail-in took effect in early 2012, Cyprus' two largest banks (Laiki Bank and Bank of Cyprus) suffered losses on their holdings of Greek government bonds.[167] ELA to Cypriot banks climbed from EUR c.3.5bn at end-2011 to c.5.5bn by end-May 2012 and, by end-October 2012, it had reached c.9.8bn;[168] notably less than the amount provided to Ireland and Greece at the height of their crises, but c.60 percent of Cyprus GDP.

On 30 May 2012, the government requested an opinion from the ECB on its proposed recapitalisation of Laiki Bank. Before the opinion was received, the government completed plans to issue a EUR 1.8bn bond for the bank's recapitalisation and officially applied to the Troika for assistance. Negotiations with the Troika dragged for a further nine months, however. On 26 June 2012, following a further series of downgrades, the ECB stopped accepting Cypriot government

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165 Compare Item 11.6, 'Sundry' in CBoC, 'Annual Report 2010', p.72 and 'Annual Report 2011', p.60.

166 Michaelides (n.150), 663.

167 Clerides (n.149), 31: 'The haircut amounted to a combined loss of €4.5 billion for [Bank of Cyprus] and Laiki, about 25% of Cypriot GDP'. Bank of Cyprus had increased its holdings of Greek government bonds significantly since 2009, despite public statements to the contrary. A report commissioned by the CBoC found no evidence of political interference to do so, citing instead the search for profits. See Alvarez and Marsal LLP, 'Bank of Cyprus: Holdings of Greek Government Debt' (2013) Investigation Report for the Central Bank of Cyprus, leaked to the press and available at http://ftalphaville.ft.com/files/2013/04/April04_2013_AM1.pdf. However, other authors observe that the Cypriot banking sector's presence in Greece made it susceptible to political pressure. See Michaelides (n.50), 660.

168 Compare 'Other Assets' in CBoC, 'Balance Sheet, End-December 2011' and 'Balance Sheet, End-May 2012', with 'Other claims on euro area credit institutions denominated in euro' in 'Balance Sheet, End-October 2012'. Available on the CBoC website. On the accounting change from 'Other Assets' to 'Other claims…', see n.94.

debt as collateral for Eurosystem operations, as it no longer satisfied the minimum credit rating requirements.[169] A spike in ELA to Cypriot banks followed, as noted in the paragraph above. With no conclusion to the bail-out negotiations in sight, the ECB did not suspend the application of the minimum ratings requirements, meaning that Cypriot debt remained excluded from the Eurosystem's monetary operations and Cyprus' banks remained dependent on ELA. In the words of the then-Governor of the CBoC: 'the ECB was trying to convince the Cyprus government that it had to…get into a programme'.[170]

Despite this, negotiations continued to falter. The Euro Area was dealing with several crises simultaneously; namely, the fallout from the second Greek bail-out and, though it is beyond the scope of this paper, Spain, which applied for emergency funding for its banking system on the same day as Cyprus. Resources were stretched and Cyprus commanded less priority. In addition, the government and its putative creditors were at loggerheads over spending reductions – anathema to a communist government basing its campaign, for forthcoming elections in February 2013, on blaming the banking sector for every aspect of the economic downturn.[171] On the other side of the table, the creditor Member States faced domestic pressure over the prospect of bailing-out what was perceived as an offshore tax haven awash with illicit Russian money. Further, despite its anti-banking rhetoric, the Cypriot government wished to preserve the attractiveness of Cyprus' banks for foreign investors and the creditors' offer of EUR 10bn (the government requested EUR 17bn) was unpalatable as it deliberately excluded the funds required for bank recapitalisation, which would leave the banks to raise their own capital after the bail-out.[172]

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169 See *Reuters*, 'Cyprus Bonds Ineligible as ECB Collateral' *Reuters* (26 June 2012), www.reuters.com/article/us-cyprus-ecb-idUSBRE85P13G20120626. Strangely, unlike the ineligibility of Greek government bonds around the same time, the ECB does not seem to have issued a press release announcing this development.

170 *The Economist*, 'What Happened in Cyprus: An Interview with Athanasios Orphanides' (28 March 2013), http://www.economist.com/blogs/freeexchange/2013/03/interview-athanasios-orphanides.

171 See Orphanides (n.157).

172 Sandbu (n.16), pp.151-2.

A draft MoU and EAP were finalised in December 2012. The incumbent government was then defeated in the February 2013 elections. The new president and other Euro Area governments agreed that the banks would be recapitalised by imposing a special tax on all depositors, including those supposedly covered by the deposit guarantee for all savings below EUR 100,000.[173] Unsurprisingly, the Cypriot parliament rejected the deal on 19 March 2013. Cypriot banks had been closed since 18 March 2013 to prevent bank-runs and would remain shut while a second deal was negotiated. With the government stalling, the ECB issued a press release on 21 March warning that ELA to Cypriot banks could only continue after 25 March if a programme was in place which reassured the ECB as to the solvency of Cypriot banks.[174] A deal was soon reached to resolve Laiki Bank entirely, with full contributions from uninsured depositors, bond holders and equity shareholders under existing bank resolution laws. Certain Laiki Bank assets were folded into Bank of Cyprus, along with Laiki Bank's liability for near-EUR 9bn of ELA. Uninsured deposits at the Bank of Cyprus would be frozen and subjected to a one-off tax for its recapitalisation, estimated at c.35 percent of savings. Cypriot banks were also required to sell their Greek branches. Funds from the EAP would not be used to recapitalise the banks. Capital controls were imposed following the deal, to prevent depositor outflow from Cyprus, and persisted until 2015. As with all EAPs, the bail-out also specified rapid consolidation of the Cypriot budget through reductions in spending and competitiveness-oriented reforms aimed at removing certain social protections.

i. *Evaluation*

Applying a similar lens to Cyprus as used to evaluate the Ireland intervention, we can assess the timing of the intervention, its form and whether it respected the limits of the ECB's mandate as regards exerting direct influence over political and economic policy.

173 See *ibid*, pp.151-4 for a damning review of this deal. Sandbu argues that the government's desire to preserve Cyprus' appeal to wealthy foreign depositors explains its attempt to push as much of the burden as possible onto small depositors. He is surprised that the other Euro Area governments accepted the proposal.

174 ECB, 'Liquidity Assistance Requested by the Central Bank of Cyprus' (n.44).

As with Ireland, Cyprus' banks were insolvent and the government, consumed with deferring serious problems until after forthcoming elections, lacked will or capacity to recapitalise or restructure them. For example, when the Cypriot government consulted the ECB on its proposed recapitalisation of Laiki Bank, the opinion issued in response (though not until after the government had progressed with its plan anyway) questioned whether, in the case of Laiki Bank, resolution might not be more appropriate.[175] In other words, the ECB knew that Laiki Bank was a failed entity that required significant restructuring. Despite this, the ECB continued to permit the CBoC to provide ELA to Laiki Bank, rather than enforcing a strict policy as regards threats to the prohibition of monetary financing. Cyprus was, at this point, engaged in negotiations for a bail-out. The continuation of ELA despite the insolvency of recipient banks allowed space and time for these discussions to present a solution to Cyprus' long-term solvency.

The ECB's intervention came when negotiations had all but failed. In a dramatic series of events, a (terrible) deal between the government and the Troika was rejected by the parliament, renewing the deadlock. The form of the ECB's subsequent intervention was a short press release on 21 March 2013, stating that ELA would be maintained at current levels until 25 March, from when it could only continue 'if an EU/IMF programme is in place that would ensure the solvency of the concerned banks'.[176] A press release is more visible than a non-public letter and its contents inform the public of what the ECB is advocating, to whom it is directing its statement and where its influence stems from (ELA). The statement is less than exhaustive, however, and does not explain why the ECB is concerned about ELA provision in Cyprus or the legal basis for its intervention. The statement is prospective to a degree, as it publicly sets a date on which the ECB will next act, although this functions more as an ultimatum than as a forward-looking legal framework. Overall, as compared to a non-public letter, the press release is more in tune with the formal requirements

175 Opinion of the European Central Bank of 2 July 2012 on the recapitalisation of the Cyprus Popular Bank (CON/2012/50), para.3.4.

176 ECB, 'Liquidity Assistance Requested by the Central Bank of Cyprus' (n.44).

for institutional action under the rule of law as it is more transparent, but the reasoning it presents is less detailed. The Ireland letter is more candid, as it expressly references the legal basis for ECB intervention as the prohibition of monetary financing. Both, however, are formative steps in the evolution of a prospective legal framework and doctrine for ECB intervention in ELA, rather than flowing from an already-articulated framework, available for scrutiny.

A further deficiency as regards the form of the intervention is the absence of a formal decision to cap ELA until 25 March. The press release states that 'the Governing Council has decided to maintain the current level of ELA' in Cyprus, pending the outcome of negotiations.[177] The ECB's announcement of 'Other Decisions' for March 2013 also acknowledges that it passed a decision to freeze ELA at a certain level on 21 March.[178] This decision has not been made public, however. The publication of reasoned decisions regarding capping ELA, redacted where necessary to protect the commercial interests of recipient banks, would be a major step forward for transparency and would force the ECB to illuminate its framework for assessing when ELA threatens the prohibition of monetary financing. In addition, publication of such decisions would allow citizens to challenge them and provide greater accountability for the ECB's interventions.

The press release also fails to intervene in ELA without straying beyond the limits of the ECB's mandate as regards economic policy, because the statement makes clear that only an EU/IMF (i.e. Troika) programme will provide confidence in the long-term solvency of the banks in question. As indicated in the evaluation of the letters to Ireland, any realistic programme which is aimed at ensuring the long-term solvency of the concerned Member State and its banking sector, and which has sufficient political support to be workable should be sufficient from the ECB's perspective. The origin of the programme and the parties to it should not be specified in advance by the ECB, as it should only support – rather than lead – the direction of economic policy. The obvious

177 *ibid.*
178 See n.44.

dilemma is that the ECB, under Article 14.4 of the Statute, must decide whether the programme does indeed ensure the long-term solvency of the Member State, which will be difficult where the ECB's preferred model has not followed. However, it is submitted that the ECB's limited mandate as regards economic policy means that only programmes which are so threadbare as to be wholly unrealistic should be rejected. In addition, it might be added that the lack of obvious success in the Euro Area of austerity-oriented policies in restoring Member States to fiscal sustainability has not prevented the ECB from accepting further programmes founded on the same model.

D. Greece

Unlike Ireland and Cyprus, Greece's ratio of debt to GDP was high before the crisis. Since the 1980s, governments had sought to increase personal income and public consumption through expansionary policies in a bid to recoup the decades lost to civil war and military dictatorship after World War II.[179] This expansionary tendency was facilitated by Greece's entrance to the euro in 2001. The borrowing costs of Member States adopting the euro converged on Germany's, as all debt was issued in the same currency and markets assumed that, in a crisis, all countries in the currency union would stand behind each other. The Treaty provisions establishing the euro did foresee and seek to mitigate this risk.[180] For example, entry criteria for the euro were established to ensure economic convergence, Protocol 12 on the Excessive Deficit Procedure (EDP) sought to incentivise governments to keep their debt and deficit under 60 and 3 percent, respectively, and Article 125 TFEU (the so-called 'no bail-out clause') states that no Member State shall assume the liabilities of another. The intention was to backstop the currency union with market discipline, rather than risk-sharing. However, these measures failed to convince and market discipline was absent in the years before the crisis: by 2005, Greece's borrowing costs on a ten-year bond had fallen from 20 percent to c.4 percent, despite not having run a consistent budgetary surplus for 50

[179] Blyth (n.18), p.62.
[180] See Tuori and Tuori (n.1), pp.41-57.

years.[181] Political choices also diluted the efficacy of the 'macro-economic constitution' established at Maastricht.[182] Notably, Greece was admitted to the euro despite not meeting the criteria for membership and, in 2003, the EDP was shown to lack teeth when EU finance ministers failed to enforce it against Germany and France. The trend continued after the crisis (understandably, given the immediate priorities of crisis management), with the CJEU demonstrating the malleability of Article 125 TFEU when ruling that it was not breached by the bail-outs, as they amount to new debt, rather than to the assumption of a Member State's liabilities by the others.[183] The market's diagnosis of a skin-deep commitment to market discipline in the Euro Area's 'macro-economic constitution' therefore seems to have been astute.

Greece's competitiveness suffered from the availability of cheap money, with its real unit labour productivity in 2007 being the highest in the Euro Area.[184] In addition, its weak tax-collection (and lack of political will to strengthen it) and uncoordinated government spending created specific structural hurdles.[185] When the government announced, in October 2009, that the reported fiscal deficit of 6.5 percent of GDP was closer to 13 percent, investors were alarmed and borrowing rates rose. Ratings agencies downgraded Greek bonds, encouraging further sales. Greece's GDP had shrunk since 2007 through intermittent recessions, while its debt had risen as a result of increased borrowing costs and the deployment of 'automatic stabilisers' in an economic downturn. An impending repayment of bonds worth EUR 8.5bn, issued ten years previously, in May 2010 worsened the situation. By the end of April 2010, the spread on Greek and German bonds exceeded 1000 basis points. The narrative of the ongoing Greek economic and political crisis from this point onwards and the decisions leading to three distinct bail-outs (2010, 2011 and 2015) are

181 Georgios Kouretas and Prodromos Vlamis, 'The Greek Crisis: Causes and Implications', *Panoeconomicus*, 57(4) (2010), 391-404, at: 393.

182 On the distinction between micro- and macro-economic constitution, see Tuori and Tuori (n.1), pp. 35-41.

183 *Thomas Pringle v Government of Ireland,* Case C-310/12, para. 146.

184 *Eurostat*, 'Labour Productivity and Unit Labour Costs', www.appsso.eurostat.ec.europa.eu/nui/show.do?dataset=nama_10_lp_ulc&lang=en.

185 Blyth (n.18), p.63.

recorded elsewhere.[186] This paper focuses on those moments where the ECB's oversight of ELA played a role.

i. *Greece I to Greece II*

Greece concluded its first EAP in May 2010. Over its first year, Greece's deficit was reduced by 5 percent of GDP, despite a 3 percent contraction of the economy.[187] However, as the IMF later acknowledged, such swift fiscal consolidation did not lead to an upswing in economic activity.[188] Instead, Greece's private debtors were unable to service their loans in the downturn, thereby increasing the banks' portfolios of non-performing loans. The banks became more unwilling to lend to the real economy, adding a credit crunch to the pressures of fiscal consolidation and economic recession. The downturn and impact of austerity policies began to manifest in public through strikes and protests. To compound the problems, the ECB raised its main interest rate from 1.00 to 1.25 percent in April 2011, precipitating a plunge in economic sentiment across the Euro Area. It was clear a second rescue package would be needed; this time, with their public riled by three bail-outs (2010: Greece I and Ireland; 2011: Portugal), the creditor Member States would insist on bailing-in private bondholders, a.k.a. private sector involvement (PSI).[189]

Euro Area finance ministers approved a draft second EAP for Greece in July 2011, which included plans for PSI.[190] The second EAP was eventually finalised in February 2012, with private holders of Greek debt accepting a 53.5 percent nominal haircut.[191] The impact of the PSI is disputed; Zestos denounces it as 'the primary cause of the spread of the crisis to other Euro Area countries',

186 For overviews, see Sandbu (n.13), Chapters 3 and 6; George Zestos, *The Global Financial Crisis: From US Subprime Mortgages to European Sovereign Debt* (Routledge, 2016), Chapter 7. For the domestic legal reforms necessitated by the bail-outs, see Afroditi Marketou, 'Greece', in *Eurocrisis Law and National Constitutional Change* (n.139). For the dynamics of the transition from Greece II to Greece III, see Kilpatrick (n.1).

187 Sandbu (n.13), p.140.

188 IMF, 'Greece: Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Arrangement', Country Report No. 13/156 (June, 2013), p.26: 'varying these assumptions would have materially affected the outlook for debt sustainability'.

189 Sandbu (n.13), p.141.

190 Council of the EU, 'Statement by the Heads of State or Government of the Euro Area and EU Institutions' (July, 2011).

191 Eurogroup, 'Statement' (February, 2012).

whereas Sandbu concludes that the fallout was orderly.[192] Regardless, it is clear that the effect of the impending PSI was, in the short-term, detrimental to the Greek banking sector. Between end-2009 and May 2012, deposits at Greek banks reduced by EUR 87bn (c.37 percent).[193] Since Greek banks were unable to access the wholesale markets, this funding gap was plugged by recourse to Eurosystem lending and ELA; the amount of the former utilised by Greek banks rose from EUR c.25bn in 2009 to highs of c.155bn in 2012, while the latter climbed from almost nothing in 2009 to over EUR 120bn in 2012.[194] A particularly notable spike in ELA provision by the Bank of Greece (BoG) followed the announcement of the draft EAP in July 2011: following confirmation that PSI would be included in Greece II, the sub-item titled 'Sundry' (until April 2012, where the BoG recorded ELA)[195] rose steeply from EUR c.1.4bn to 14bn, as uncertainty over the impact of the PSI on Greek banks mounted.[196]

A second pronounced spike in ELA is observable in 2012. On 28 February 2012, following the finalisation of the second EAP, the ECB announced that Greek government bonds were henceforth ineligible as collateral in Eurosystem operations, having now been downgraded to below the minimum credit thresholds for eligible collateral.[197] On 8 March 2012, however, the minimum credit rating was suspended in relation to Greek bonds, following the conclusion of a 'buy-back scheme' to sustain their price and protect the ECB from loss.[198] The impact on Greek banks' recourse to ELA is stark: it rose from EUR c.58bn at end-January to c.110bn at end-February, before returning to c.48bn at end-March 2012.[199]

192 Zestos (n.186); Sandbu (n.13), pp.143-4.
193 Commission Decision of 29 April 2014 [on various State Aid measures in relation to the Greek banking sector] (2014/885/EU) (OJ L 357, 12122014, p.112), para.32.
194 Bank of Greece, cited in Yiannis Mouzakis, *MacroPolis*, '2014 Is Not 2012' (5 December 2014), www.macropolis.gr/?i=portal.en.the-agora.1974.
195 See n.94.
196 Compare BoG, 'Financial Statement' of 30 June and 31 July 2011, available on the BoG website.
197 ECB, 'Eligibility of Greek Bonds Used as Collateral in Eurosystem Monetary Policy Operations' (28 February 2012), www.ecb.europa.eu/press/pr/date/2012/html/pr120228.en.html.
198 ECB, 'Eligibility of Bonds Issued or Guaranteed by the Greek Government in Eurosystem Credit Operations' (8 March 2012), www.ecb.europa.eu/press/pr/date/2012/html/pr120308_1.en.html.
199 Compare BoG, 'Financial Statement' of 31 January, 29 February and 31 March 2012, available on the BoG website.

A third spike emerges at this particular stage of the Greek crisis. In July 2012, the ECB announced that Greek bonds were, again, ineligible as collateral for Eurosystem operations, due to the expiry of the buy-back scheme.[200] The application of minimum credit rating thresholds was again suspended in December 2012, following a positive assessment of Greece's progress under the second EAP.[201] In response, recourse to ELA in the Greek banking system rose from EUR c.65bn in July to 100-120bn from August to December, before dropping to a (relatively) healthy c.25bn in early-2013.[202]

Two points are particularly note-worthy in this sequence. First, the interaction between Eurosystem collateral eligibility and reliance on ELA. Once the ECB applied the minimum credit ratings threshold to Greek bonds, Greek banks' stocks of eligible collateral were reduced and they could no longer access the Eurosystem's monetary policy operations. Instead, being still excluded from the wholesale markets and lacking a stable deposit base, they resorted to ELA. The spikes in ELA drawn from the BoG are very noticeable. However, this was anticipated in the ECB's statements on the ineligibility of Greek bonds. For example, in February 2012, when suspending Greek bonds from Eurosystem operations, the ECB confirmed that 'the liquidity needs of affected Eurosystem counterparties can be satisfied by the relevant national central banks, in line with relevant Eurosystem arrangements (emergency liquidity assistance)'. The subsequent sentences of the press release emphasise that Greek bonds are expected to become eligible again very soon.[203] The purpose of the ECB's statement therefore appears to have been to calm any panic over Greek bank illiquidity resulting from the ineligibility of Greek bonds, thereby reducing the risk of disruptions which would threaten the course of the second EAP. The ECB's desire to avert unnecessary panic is also apparent in the absence of a limit on the amount of ELA the BoG could

200 ECB, 'Collateral Eligibility of Bonds Issued or Guaranteed by the Greek Government' (20 July 2012), www.ecb.europa.eu/press/pr/date/2012/html/pr120720.en.html.
201 ECB, 'ECB Announces Change in Eligibility of Debt Instruments Issued or Guaranteed by the Greek Government' (19 December 2012), www.ecb.europa.eu/press/pr/date/2012/html/pr121219.en.html.
202 Compare BoG, 'Financial Statement' for the respective months. Available on the BoG website.
203 ECB (n.197).

provide to plug the funding gap. The ECB's deliberately reassuring signals at this point stand in contrast to the interaction between Eurosystem collateral eligibility and ELA during the transition from Greece II to Greece III, where the timing of the suspension of Greek bond eligibility indicates a different set of motivations.

The second noteworthy feature is that the ECB appears to have been behind the curve on Europe's political will to include PSI in the second EAP. For example, in its Monthly Bulletin of October 2011, the ECB was advocating that 'all euro area governments need to show their inflexible determination to fully honour their own individual sovereign signature', despite it being clear that PSI would be included in the Greece II.[204] That said, the ECB did not create obstacles to the PSI and, as suggested above, its interventions were framed in language and signals designed to reassure, rather than warn. The ECB therefore followed, rather than shaped, the selection of preferences in national and European politics.[205] In contrast, in its interventions in Ireland and Cyprus, the ECB forced a conclusion to (tortuous) political negotiations by warning that ELA would be removed unless an EAP was agreed. In the transition from Greece II to Greece III in 2015, the ECB would triangulate more successfully between intervention and its objective to support (not determine) economic and political choices.

ii. *Greece II to Greece III*

ELA in the Greek banking sector reduced steadily through 2013 and 2014, returning to almost nothing by August 2014. By April 2014, Greece had returned to the market with an oversubscribed issue of EUR 3bn of five-year bonds, deposit-outflow from Greek banks had begun to reverse and they had regained access to wholesale markets, as represented by a sharp reduction in their

204 See Sandbu (n.13), p.142; citing ECB, 'Monthly Bulletin' (October, 2011), p.6-7.
205 For an alternative view that the ECB, at this point, introduced economic conditionality to its collateral eligibility policy in a more interventionist manner, see Viterbo (n.3), 506-14.

drawings on Eurosystem lending and ELA.[206] Nor did the market react adversely to a review of the second EAP, which uncovered a sizeable funding gap through 2014 and 2015.[207]

By late January 2015, following early elections triggered by the Parliament's failure to indirectly elect a new President, a new Greek government was formed, headed by the anti-austerity party Syriza, which promised to reverse many of the policies mandated by the first two EAPs. It was clear, however, that Greece required access to the remaining EUR 7.2bn of funds from the second EAP, if it was to honour forthcoming repayments under Greece I and Greece II. Should it fail to make these repayments, Greece would default on the 'Troika', not receive any additional funding and probably be forced into exiting the single currency.

The second EAP made the release of tranches of funds conditional on the Commission, the IMF and the ECB reviewing action taken so far by Greece as satisfactory. Given the new government's anti-austerity platform, the ECB again suspended the waiver on the application of the minimum credit ratings to Greek bonds, reasoning that 'it is currently not possible to assume a successful conclusion of the programme review'.[208] The response was (predictably) an immediate spike in ELA in the Greek banking system from EUR c.5bn in January to c.65bn by the end of February.[209] Unlike the spike in ELA provision which followed the suspension of Greek bonds from Eurosystem operations in February and July 2012, the ECB used its (self-granted) power under the ELA Procedures to set an ex ante limit on ELA provision over a short period of time in order to place a ceiling on ELA from the Bank of Greece. This ceiling was adjusted regularly and functioned as a barometer for tense and acrimonious negotiations between Greece and its creditors.[210] The increased pressure on Greek banks is also apparent in the steep re-acceleration of

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206 See BoG, 'Financial Statement' for the relevant months. Available on the BoG website.

207 Commission, 'The Second EAP for Greece, Fourth Review', Occasional Papers 192 (April, 2014), pp.70-2.

208 ECB, 'Eligibility of Greek Bonds Used as Collateral in Eurosystem Monetary Policy Operations' (4 February 2015), www.ecb.europa.eu/press/pr/date/2015/html/pr150204.en.html.

209 BoG, 'Financial Statement, 28 February 2015'; BoG, 'Financial Statement, 31 January 2015'.

210 Updates regarding the ELA-ceiling were often provided via informal sources, however. For example, following Greece's successful scramble in early May to make a EUR 200m repayment to the IMF, an anonymous source revealed that the ELA limit had been raised. See *Reuters*, 'ECB Raises Emergency Funding Cap for Greek

deposit-outflow, reversing a gradual rally since 2012.[211] The key difference between 2012 and 2015 motivating this change of tactic was the lack of agreement between the Greek government and its international creditors on how to proceed; whereas the suspension of the eligibility of Greek bonds in 2012 followed agreement on a second EAP, by 2015 the Greek government was seeking to reverse precisely that policy. The placing of a ceiling on ELA and its publication were reminders, during this period of political uncertainty, that ELA is provided under the shadow of Governing Council objection.

Two forthcoming repayments caused tensions to crystallise: a set of repayments to the IMF in June and one of EUR 2.3bn to the ECB in July. In early June, the Greek government announced it would bundle the IMF repayments throughout June into one payment at the end of the month. Soon after this announcement, in the context of worsening diplomatic relations between Greece and its creditors, deposit-outflow from Greek banks topped EUR 2bn in the week commencing 15 June.

In order to meet these repayments, the Greek government accepted the need for a third bail-out and exchanged draft documents for a third EAP with the Troika (from 2015, the 'Institutions', following its overdue but meaningless rebranding).[212] On 26 June, the Greek prime minister announced a referendum on whether Greece should accept a third EAP premised on policies outlined in draft documents. The ECB responded with a press release on 28 June confirming that ELA would be maintained at current levels for the foreseeable future.[213] On 1 July 2015, the IMF confirmed that Greece had become the first developed economy to default on its obligations, after it missed the repayment deadline at the end of June. The announcement prompted fears that savers would relocate their funds outside of Greece; the result of a bank-run under conditions of limited

Banks to 78.9 Bln Euros- Source' (6 May 2015), www.reuters.com/article/eurozone-greece-ecb-idUSL5N0XX2YD20150506.

211 ECB, cited in BNP Paribas, 'Greek Banks Under Pressure' (26 June 2015), www.economic-research.bnpparibas.com/Views/DisplayPublication.aspx?type=document&IdPdf=25759.

212 For consistency, this paper continues to use 'Troika'.

213 ECB, 'ELA to Greek Banks Maintained at Its Current Level' (n.83).

ELA and a government unable to access the markets could well have been Greece's exit from the single currency. The government therefore imposed capital controls from 29 June until (initially) the conclusion of the referendum on 6 July. Bank branches were prohibited from opening to the public, withdrawals were limited to EUR 60 per day and transfers abroad were subject to approval from a specially-formed Committee (transfers between Greek accounts were unaffected). Civilian and business life was disrupted. In particularly painful scenes, many elderly Greeks were unable to access their pensions.

Following the rejection, by referendum, of the proposed bail-out terms on 6 July, the ECB released a further statement that ELA would continue to be maintained at current levels.[214] The ECB also stated that the Governing Council had adjusted the haircuts which the BoG must apply to collateral accepted in return for ELA. The ECB reasoned that, since the quality of the collateral is derivative of 'the financial situation in the Hellenic Republic', haircuts should reflect its worsened condition. The BoG's monthly financial statement for June indicates that the level of ELA permitted at the end of the month (and thus maintained into July) was EUR c.87bn.[215] At the end of June, analysts from Barclays concluded that the ECB was applying a c.48 percent haircut to collateral posted in return for ELA, leaving the balance sheets of Greek banks with a buffer of EUR c.30bn in terms of assets in excess of the ceiling on ELA provision. We do not know the precise level to which the ECB raised haircuts in July, but the same sensitivity analysis suggests that, should haircuts have been raised to just over 60 percent, the banks' collateral buffers would turn negative. The likely result would be a bail-in of deposits, in order to maintain the solvency of Greek banks, and/or exit from the single currency. With its options limited, the Greek government requested a third bail-out from the European Stability Mechanism. Greece III, premised on conditions at least as strict as those rejected by referendum just days earlier, was agreed in mid-August 2015, with an interim loan of over EUR 7bn being provided in the meantime to permit Greece to honour a

[214] ECB, 'ELA to Greek Banks Maintained' (n.83).
[215] BoG, 'Financial Statement, 30 June 2015'.

repayment on bonds held by the ECB. Since August 2015, ELA has reduced, but it remained EUR c.48bn in July 2016.[216]

iii. *Evaluation*

The ECB's intervention in ELA during the transition from Greece II to Greece III represents its most successful attempt so far (with an emphasis on the relative nature of this praise) to balance justified intervention with respect for the independence of the political process.

First, the sustainability of the Greek banking sector and the credibility of the Greek budget were sufficiently in doubt as to raise monetary financing concerns. The government had recently defaulted on the IMF, applied for a third bail-out and announced a referendum on its terms. In addition, high levels of ELA had been a feature of the banking landscape for several months. There was therefore a basis for intervention.

The form of the intervention was public. The first press release, on 28 June 2015, is more discursive than the Cyprus intervention as it quotes different stakeholders, such as the Governor of the BoG, and provides reassuring messages on the ECB's commitment to financial stability.[217] It also provides some background, citing the Greek government's decision to hold a referendum and the cessation of the second EAP (on Greece's default to the IMF) as having prompted the ECB's intervention. The second press release, on 6 July 2015, maintained ELA at the same level but also adjusted the haircuts applied to Greek government bonds collateralising ELA. Some background is provided to explain this additional measure, with the ECB noting that 'the financial situation in the Hellenic Republic has an impact on Greek banks', due to the fact that much ELA was collateralised with Greek debt. Neither press release identifies the legal basis for intervention in ELA (or for adjusting haircuts on Greek banks), rendering – on the face of the press releases alone

216 BoG, 'Financial Statement, 31 August 2016'.
217 ECB, 'ELA to Greek Banks Maintained at Its Current Level' (n.83).

– the justification for the ECB's actions opaque. In addition, as with Cyprus, the actual decisions to freeze ELA or to adjust haircuts are not made public.

This absence of a public, reasoned decision is especially concerning because it has impeded a private legal challenge to the freezing of ELA launched by a Greek firm. Alcimos alleges that it suffered lost business as a result of the capital controls that were necessitated by the ECB's actions.[218] The case is still in process, but – as Kilpatrick observes – the non-public nature of the decision has already led to the bizarre outcome of the CJEU, in an interim judgment, citing the language of the press releases as 'the contested decisions', rather than referencing the formal acts.[219] The lack of transparency has therefore had a direct impact on the ability of concerned citizens to hold the ECB to judicial account and even, it appears, on the CJEU's access to the decisions under review.

The ECB does, however, provide more space for political negotiation than it did in Ireland and Cyprus. It does not threaten that ELA will be withdrawn, only that 'the Governing Council stands ready to reconsider its decision'.[220] The negotiating parties are therefore not placed under the shadow of an ultimatum. The ECB also reassures readers that it 'is determined to use all the instruments available within its mandate' to ensure financial stability.[221] Most notably, the ECB does not prescribe an outcome to the negotiations, other than that it should restore confidence: 'the Governing Council welcomed the commitment by ministers from euro area Member States to take all necessary measures to further improve the resilience of euro area economies and to stand ready to take decisive steps to strengthen [EMU]'.

218 See *Alcimos Consulting SMPC v European Central Bank*, T-368/15 R and the related documents available on www.alcimos.com.

219 *ibid.* See Kilpatrick (n.1) for discussion.

220 ECB, 'ELA to Greek Banks Maintained at Its Current Level' (n.83); ECB, 'ELA to Greek Banks Maintained' (n.83).

221 *ibid.*

The ECB may only have been seeking to avoid inflaming the debate, but its language does leave open the option that the relevant ministers and officials could have agreed on an alternative path of reforms. In 2015, they did not and Greece eventually accepted another austerity-oriented bail-out. The ECB's statement indicates, however, that it would not oppose a change of approach in the future should there be sufficient political will in other Member States for alternative economic policies to strengthen the Euro Area. At the very least, the language of the Greece press releases in 2015 implies that the ECB has begun to align its power of intervention with a recognition of the limits of its mandate.

5. Conclusion

The ECB's interventions in ELA have been premised on protecting the prohibition of monetary financing. A multi-layered legal justification therefore exists for the ECB's attachment of conditionality to continued ELA provision. It is not multi-layered in the sense that different sources of law are utilised (the key provisions are found in the Treaties) but because it requires understanding of the inter-relationships and purposes of, inter alia: the objectives and tasks of the Eurosystem, the differences between Eurosystem and non-Eurosystem tasks, the Governing Council's power of objection to non-Eurosystem tasks, the manner in which the ECB has sought to establish greater control over ELA, the effect of soft law on Treaty provisions, the purpose of the prohibition on monetary financing and the ECB's monitoring role in relation to it. The justification for ECB intervention in ELA also requires understanding of: the traditional nature of the role of the LOLR, the nature of ELA, the provision of ELA during the Eurocrisis to support entire banking systems, and of the nexus between the solvency of the banking sector and the fiscal credibility of its government. The paper has sought to explain these different facets and to illuminate the legal basis for the ECB's power to intervene in ELA and attach conditions to its continued provision.

That is not to say that the ECB's interventions have been legally unproblematic. The ECB's doctrine of ELA oversight and intervention has emerged piecemeal through pragmatic engagements with a rapidly unfolding series of events. Serious problems regarding the form of the ECB's interventions and its unwillingness to provide reasons for its actions are evident in Ireland, Cyprus and Greece. In addition, especially in the former two Member States, the ECB has assumed too much of a leading role in prescribing particular economic policies to address the long-term solvency of the Member State in question. This is deeply problematic, because the policies concerned affect social spending and labour protection, meaning that a technocratic, independent institution has intervened in fields more suited to democratic contest and played a leading role in reducing the rights and benefits enjoyed by citizens. In Greece, in 2015, the language of the ECB's intervention was somewhat more nuanced and recognised that the direction of the EAP should be determined at the political level. This is not say that the ECB was disinterested in the conditions attached to Greece III (it could be argued that the habit of austerity-oriented rescue packages is now so ingrained in EMU that it did not require vocalisation). However, the wording of the 2015 intervention does at least recognise that it is inappropriate for the ECB to determine economic policies in EMU.

The paper has also raised three other important issues, though time and space precludes a detailed consideration. First, the ECB's oversight of ELA will likely change in the future due its access to data through the SSM and its supervisory powers thereof. Likewise, the establishment of a framework for bank restructuring in the EU and the possibility of loss-sharing across the SRM may change the amount of influence wielded by the ECB through ELA, as bank failure may no longer be regarded as something to avoid at all costs.

Second, the legality of the actual bail-out conditions has not been addressed, though it is arguable that the EAPs are, in themselves, contrary to EU law for contravening substantive rights.[222] A complete study of the legality of the ECB's interventions should also consider this question.

Third, the paper raises doubts as to the adequacy of ECB's accountability. Notably, a supranational, independent institution has intervened to shape policy within individual Member States. The ECB's accountability (such as it is) is oriented towards the European Parliament and is wholly incapable of accommodating the discrepancy between the nationally-focused costs and consequences of the ECB's interventions and its supranational accountability framework. The unsatisfactory nature of this arrangement is clear when we consider that the ECB's interventions affect policy areas (tax, expenditure and social and labour rights) in which the EU has had little competency in the past. The corrosive nature of this accountability gap is evident in Ireland. The ECB refused to participate in the Oireachtas banking inquiry into the causes of Ireland's crisis, thus undermining an important exercise of national self-examination.[223] Reform should be considered to provide a degree of accountability between the supranational institutions and national parliaments once a Member State enters a bail-out.

These three issues are ancillary to this paper, however, which has explored the legal justification behind the ECB's interventions in ELA and proposed some broad limits to that power.

[222] See Markus Krajewski, 'Human Rights and Austerity Programmes', in *The Rule of Law in Monetary Affairs*, ed. Thomas Cottier et al (Cambridge University Press 2014).

[223] See ECB, 'ECB to Matt Carthy MEP (17 February 2015)' (n.77).

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